TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1955

No. 30

DANTAN GEORGE REA, PETITIONER,

vs.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR CERTIORARI FILED JANUARY 19, 1955

CERTIORARI GRANTED MARCH 7, 1955

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

No. 30

DANTAN GEORGE REA, PETITIONER,

vs.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

INDEX

	Original	Print
Proceedings in U.S.C.A. for the Tenth Circuit	1	1
Statement of points	1	1
Record from U.S.D.C. for the District of New Mexico	2	2
Indictment	2	2
Docket entry—withdrawing plea of guilty and entering plea of not guilty	2	2
Amended motion to quash search warrant and to suppress evidence	3	3
Docket entry—motion that indictment be dismissed and order thereon	4	4
Judgment	4	5
Motion for an order to show cause and other relief	5	5
Opinion, Rogers, J.	7	8
Order denying motion for an order to show cause and for other relief	8	8
Notice of appeal	9	9
Clerk's certificate (omitted in printing)	10	

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MAY 27, 1955

—2153-5

	Original	Print
Supplemental record	12	10
Transcript of hearing on the motion for an order to show cause	12	10
Clerk's certificate (omitted in printing)	16	
Minute entry of argument and submission (omitted in printing)	20	
Opinion, Huxman, J.	21	14
Judgment	27	19
Clerk's certificate (omitted in printing)	28	
Order granting certiorari	29	29

[fol. 1]

IN THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 4974

DANTON GEORGE REA, Appellant,

v.

UNITED STATES OF AMERICA, Appellee

STATEMENT OF POINTS—Filed August 26, 1954

The appellant will rely upon the following points on appeal:

1. The trial court erred in denying appellant's motion for an Order to Show Cause why Narcotics Agent Jack Salter and such other officers and agents of the United States as participated in the violation of the suppression order, should not be held in contempt.

2. The trial court erred in denying appellant's motion for an Order enjoining Narcotics Agent Jack Salter and such other officers and agents of the United States as have physical or legal control in the name of the United States of the suppressed evidence, from transferring said evidence out of the legal custody of the United States and from testifying as to the existence, character, possession of, or facts about, the suppressed evidence.

3. The trial court erred in limiting its order of suppression to use of the illegally obtained evidence in the United States District Court for the District of New Mexico.

McKenna & Sommer, By Joseph A. Sommer.

Filed with Certificate of Service, Aug. 26, 1954.

[fol. 2] IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

Pleas and Proceedings before the Honorable Waldo H. Rogers, Judge of the United States District Court for the District of New Mexico, presiding in the following entitled and numbered action:

No. 17906 Criminal

UNITED STATES OF AMERICA, Plaintiff,

v.

DANTAN GEORGE REA, Defendant

INDICTMENT—Filed September 12, 1953

Sec. 2593(a), Title 26, USC. Acquiring marihuana without having paid transfer tax.

The Grand Jury Charges:

On or about the 13th day of August, 1953, at Albuquerque, in the State and District of New Mexico, Dantan George Rea, being then and there a transferee of marihuana did unlawfully acquire and otherwise obtain a quantity of marihuana, to-wit, bulk marihuana, marihuana seeds and marihuana cigarettes, without having paid the transfer tax required by law.

In violation of Title 26, USC, Section 2593(a).

A True Bill:

H. B. Horn, Foreman of the Grand Jury; Paul F. Larrazolo, United States Attorney. In the United States District Court.

Docket Entry of September 28, 1953

At Albuquerque: Judge Hatch presiding in open court. The Government is represented by its attorney, Paul F. Larrazolo, U. S. Attorney. The defendant appears in his [fol. 3] own proper person and accompanied by his attorney, Richard M. Krannawitter. Now with leave of Court

first had and obtained defendant withdraws his former plea of Guilty and enters a plea of Not Guilty to the charge contained in the indictment which plea is received by the Court and ordered entered of record.

In United States District Court

Amended Motion to Quash Search Warrant and to Suppress Evidence—Filed June 16, 1954

The defendant appearing by his attorney, Thomas F. McKenna, appointed by this Court, makes the following amended Motion that a certain purported search warrant, issued by the United States Commissioner Owen J. Mowrey, on August 13, 1953, to Narcotics Agent Jack Salter, be quashed, and that all property seized pursuant to said purported search warrant from defendant's home at 1805 Ridgecrest Drive, SE, Albuquerque, New Mexico, be suppressed as evidence against him in any criminal proceeding including the above entitled action. In support thereof the defendant states as follows:

1. That on August 13, 1953, defendant was the owner of the premises known as 1805 Ridgecrest Drive, SE, said premises being defendant's dwelling place.

2. That on said date Jack Salter, a Narcotics Agent of the Treasury Department of the United States, under authority of a purported search warrant issued by United States Commissioner Owen J. Mowrey, illegally entered said premises and illegally searched the same and illegally seized certain objects described by Jack Salter as marijuana cigarettes, seven paper bags containing a portion of bulk marijuana or marijuana seeds, and five Prince Albert tobacco cans containing portion of bulk marijuana or marijuana seeds, two (2) Chicken Bone pipes, one pair brass knuckles, and one flat green box containing approximately 300 marijuana seeds.

3. That said purported search warrant, and the affidavit upon which it was based, is insufficient on its face.

4. That probable cause did not exist for believing the

[fol. 4] existence of the grounds on which said purported search warrant was issued.

5. That said affidavit was not made by a person purporting to have personal knowledge of the facts sworn to but purports to be based wholly on unsworn statements of others.

6. That the aforesaid search and seizure was without defendant's permission and was in violation of his rights under the Fourth Amendment to the Constitution.

7. For such other and further reasons that may be urged on the hearing of this Motion.

Thomas F. McKenna, Attorney for Defendant.

Filed with Certificate of Service, June 16, 1954.

In United States District Court

Docket Entry of June 18, 1954

At Santa Fe, Judge Rogers presiding in open court. This cause coming on for hearing upon defendant's Amended Motion to Quash Search Warrant and to Suppress Evidence, the Government is represented by James Borland, Esq., Assistant U. S. Attorney and the defendant by his assigned attorney, Thomas F. McKenna, Esquire. After considering copies of the Affidavit for Search Warrant and of the Search Warrant, which were offered and received in evidence by stipulation of counsel, and having heard counsel, the Court found that said Motion to Quash Search Warrant and to Suppress the Evidence is well taken and should be granted and So Ordered. Thereupon the Assistant U. S. Attorney now makes oral motion that the Indictment returned herein be dismissed and the Court being well advised in the premises, So Ordered.

In United States District Court

Judgment of Dismissal—Filed June 18, 1954

This cause being called for hearing upon Defendant's Amended Motion to Quash Search Warrant and to Suppress Evidence, which motion was filed June 16, 1954, the United [fol. 5] States is represented by James Borland, Esquire, Assistant United States Attorney, and the defendant by his attorney, Thomas F. McKenna, Esquire, the Court, having considered said motion and heard counsel, finds that said motion is well taken and should be granted, and the Assistant United States Attorney, having orally moved for dismissal of the Indictment, the Court finds that said motion to dismiss should be sustained and that the said defendant is entitled to be discharged; now therefore,

It Is Considered, Ordered and Adjudged, and It Is the Judgment of the Court, that the Indictment herein, as to the defendant, Dantan George Rea, be, and the same is hereby dismissed; and that the said defendant go hence without day as to the charge contained therein, and that he and his bond, if any, stand discharged.

Done in open Court at Santa Fe, New Mexico, this 18th day of June, A.D. 1954.

Waldo H. Rogers, United States District Judge.

In United States District Court

Motion for an Order to Show Cause and Other Relief—Filed June 21, 1954

Comes Now the defendant, by his attorney, Thomas F. McKenna, assigned by this Court, and moves the Court as follows:

1. That an Order to Show Cause Why He Should Not Be Held In Contempt be issued and served upon Narcotics Agent Jack Salter and such other officers and agents of the United States as have participated in the violation of the Order of this Court suppressing certain evidence

obtained in violation of defendant's constitutional rights, said order being issued June 18, 1954.

2. That an Order issued to, and be served upon, Narcotic Agent Jack Salter and such other officers and agents of the United States who have physical or legal control in the name of the United States of the aforesaid suppressed evidence, forbidding and enjoining him and them from testifying as to the existence, character, possession of, or [fol. 6] facts about; the aforesaid suppressed evidence, and from transferring said evidence out of the legal custody of the United States, and commanding him and them, if said evidence has already been transferred out of the custody of the United States, immediately to reacquire custody and possession in the name of the United States and to destroy the evidence, or transfer it to other agencies of the United States as required by Section 2598(d), Title 26, United States Code.

3. To hold a hearing to determine the existence of the grounds alleged in support of such orders.

4. To issue such further Order as is necessary to protect the defendant's constitutional rights and to enforce the previous Order of this Court suppressing said evidence, and such further Order as the defendant may be entitled to in the premises.

As grounds therefor, defendant alleges as follows:

1. That on June 18, 1954, this Court granted defendant's Motion to Suppress certain evidence for use in any criminal proceeding on the grounds that it was taken by an illegal search and seizure by Narcotic Agent Jack Salter who was at the time acting as an officer and agent of the United States, said search and seizure being in violation of defendant's Constitutional right.

2. At the time said Order was issued, the evidence suppressed was in the legal custody of the United States, and held by the Bureau of Narcotics of the Treasury Department and in the physical custody and control of the officers of said Bureau in their capacity as officers and agents of the United States, and not as individuals.

3. On information and belief, it is alleged that Narcotics Agent Jack Salter learned of, and was informed that this Court had suppressed said evidence.

4. Thereafter, with knowledge of said Order of suppression, and in defiance of said Order, on June 18, 1954, Narcotics Agent Jack Salter made an affidavit before a Justice of the Peace of the State of New Mexico, stating that on August 13, 1953, defendant was in possession of marijuana, and procured the issuance of a warrant of arrest against defendant for possession of marijuana in violation of the [fol. 7] statutes of New Mexico. Defendant was arrested on said warrant and complaint and is held on such charge by the State of New Mexico.

5. The allegation in said affidavit and complaint made by Narcotic Agent Jack Salter is based upon, and acquired solely as the result of the illegal search and seizure referred to, and makes use of said suppressed evidence by means of oral testimony. It is alleged on information and belief that Narcotic Agent Jack Salter intends to, and will if not restrained by this Court, testify further in said criminal proceedings brought by the State of New Mexico to the existence, character, possession of, and facts about, said suppressed evidence, and that he, and/or other officers of the Bureau of Narcotics intend to, and will if not restrained by the Court, illegally surrender possession of said suppressed evidence, now in the custody of the United States, to the prosecuting authorities of the State of New Mexico, or will themselves directly use said suppressed evidence in criminal proceedings brought by the State of New Mexico.

6. Said action by Narcotic Agent Jack Salter, and said threatened action constitutes a violation of the Order of this Court and of the defendant's right not to have evidence, illegally seized by the Federal government, transferred and made available to the State of New Mexico for prosecution, rather than suppressed as ordered by this Court.

7. As to the allegations in paragraphs 2, 4 and 5, they are believed to be true according to information and belief.

Respectfully submitted, Thomas F. McKenna, Attorney for Defendant.

IN UNITED STATES DISTRICT COURT

OPINION—Filed July 2, 1954

I have read the Briefs submitted by Defendant and the Government, and feel I am sufficiently advised in the premises to render a Decision herein.

[fol. 8] It is interesting to note that the precise question has never been decided in a United States District Court, so far as reported Decisions are concerned.

I have reached the conclusion that suppression of evidence in a Federal Court, under Rule 41 of the Federal Rules of Criminal Procedure, and the Fourth Amendment to the Constitution of the United States, applies only to proceedings in a United States District Court, and does not govern the use of that evidence in a State Court.

Accordingly, an Order may be presented, denying the relief sought in the pending Motion and Amended Motion.

Waldo H. Rogers, U. S. District Judge.

IN THE UNITED STATES DISTRICT COURT

ORDER DENYING MOTION FOR AN ORDER TO SHOW CAUSE AND FOR OTHER RELIEF—Filed July 2, 1954

This matter coming on for hearing on the Amended Motion to Quash Search Warrant and to Suppress Evidence in the above-entitled cause and on Motion that an Order to Show Cause be issued directing Federal Narcotic Agent Jack Salter and such other officials and agents of the United States as might be involved why they should not be held in contempt for failure to obey the orders of this Court, both of the foregoing motions having been filed by counsel for the defendant Danton Rea, and the Court being fully advised in the premises, the Court finds:

That the original Amended Motion to Quash Search Warrant and to Suppress Evidence filed in this Court by the defendant was sustained by this Court on June 18, 1954, only insofar as the Court therein and thereby prohibited the introduction of the evidence thereby obtained by Agent Jack Salter through an illegal federal search warrant in this

Court and had no bearing whatsoever on the use of said evidence in the State Courts of New Mexico, the Court only suppressing the use of said evidence in the United States District Court for the District of New Mexico.

It Is Therefore Ordered that said evidence obtained by Agent Jack Salter through the use of an illegal federal search [fol. 9] warrant is suppressed insofar as its use in the United States District Court for the District of New Mexico is concerned and that such evidence may not be used against the defendant in the United States District Court for the District of New Mexico;

It Is Further Ordered that the motion filed herein on behalf of the defendant Danton Rea asking that this Court find Agent Jack Salter in contempt of the orders of this Court and further asking that the said Agent Jack Salter be forbidden and enjoined from testifying in the State Courts of New Mexico as to the evidence, character, possession of, or facts about any marihuana seized by him in the foregoing cause, and further forbidding him from turning over said marihuana to the State authorities of the State of New Mexico, Be And Is Hereby Denied.

Dated this 2nd day of July, 1954.

Waldo H. Rogers, United States District Judge.

IN THE UNITED STATES DISTRICT COURT

NOTICE OF APPEAL—Filed July 12, 1954

Notice is hereby given that Danton Rea, defendant herein, hereby appeals to the United States Court of Appeals for the Tenth Circuit from the Order denying defendant's Motion for an order to show cause and for other relief, said order being entered in the above-entitled action on July 2, 1954.

Name and address of appellant: Danton Rea, 1805 Ridgecrest Drive, S. E. Albuquerque, New Mexico.

Name and address of appellant's attorney: McKenna & Sommer, 302 East Palace Avenue, Santa Fe, New Mexico.

Offense: Violation of Section 2593(a), Title 26, U.S.C.—Acquiring marihuana without having paid transfer tax.

Concise statement of judgment or order, giving date, and any sentence: Order of July 2, 1954, denying defendant's Motion for an order to show cause why Narcotic Agent should not be held in contempt, and for other relief.

[fol. 10] Danton Rea, the above-named appellant, hereby appeals to the United States Court of Appeals for the Tenth Circuit from the above-stated judgment and order.

Dated July 12, 1954.

McKenna & Sommers, by Thomas F. McKenna, Attorneys for Appellant.

Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 11] IN THE UNITED STATES DISTRICT COURT

[Title omitted]

[fol. 12] TRANSCRIPT OF HEARING—Filed October 5, 1954

Be It Remembered, that on the 28th day of June, 1954, at 10:05 o'clock A.M., the above entitled cause was heard in Santa Fe, New Mexico, before The Honorable Waldo H. Rogers, U.S. District Judge, the Plaintiff appearing by its attorney, Mr. Paul Larrazolo; the Defendant appearing by his attorneys, Messrs. Thomas F. McKenna, Sr., and Joseph A. Sommer; at which time and place the following proceedings were had:

The Court: Say, on this Rea matter, I don't know how it got in the paper that I have been holding—have something for contempt. I haven't, at all. I don't know who gave it, and I want to find out how that thing emanated.

Mr. Larrazolo: I don't know, Judge. I saw it in the paper, myself.

The Court: There is no angle of contempt possible, unless I ordered, at the time I had in mind, that certain things should be done.

Mr. Larrazolo: The Order is rather silent.

The Court: I haven't signed any Order, all I have done is to call up a Motion.

Mr. McKenna: Judge, I might give a little bit of information on that. I was approached by one of the newspaper reporters, and I gave them a copy of my Motion, but at that time, there was no statement he was going to be held in contempt.

The Court: Who did you give it to?

Mr. McKenna: Mr. Curtis.

The Court: There is no angle of contempt in this thing, this morning. It is limited to whether evidence that was suppressed, here, be used in the State Court.

Mr. Larrazolo: Shall they take the affirmative of the issue?

The Court: Now, let's see, what authorities have you got? I can't spend very long on the thing. Have you a memorandum or anything prepared, Mr. McKenna?

[fol. 13] Mr. McKenna: Yes, I have, Your Honor. I did want to—I don't know how the Court is going to be, for time.

The Court: I haven't any.

Mr. McKenna: I did want to call Mr. Salter, as an adverse witness, to elicit some testimony, so I would be in a position to ask the Court for the proper relief; to get the pertinent facts.

Mr. Larrazolo: I believe we can stipulate. He is about to prosecute for the same offense, in the State Court with the same evidence, isn't that right?

Mr. Salter: Yes, sir.

Mr. McKenna: There are certain things I want to find out about the Complaint—what Mr. Salter did, and where the evidence is, so it can be framed.

Mr. Larrazolo: If the Court please, we will stipulate that the evidence is now in the custody of the Secretary of the Treasury, in Albuquerque. Mr. Salter knows where it is. It is in the custody of the Secretary of the Treasury.

Mr. McKenna: There was some other additional information I wanted to find. Whether or not Mr. Salter had any chemical analysis, any Government chemist was employed by the Government to analyze this testimony, or whether or not he was there by himself, when the employment took

place, and the information and other facts, so again, I can be in a position—(Interrupted)

Mr. Larrazolo: If the Court please, we can stipulate it has been analyzed by a chemist, determined to be marijuana.

Mr. McKenna: Was that evidence turned over to the chemist by yourself?

Mr. Salter: Yes.

Mr. McKenna: You were the only one that was present when that evidence was turned over to the chemist?

Mr. Salter: Yes, I believe I was.

Mr. McKenna: If that is part of the stipulation, that will be all right.

[fol. 14] The Court: Do you want to have your secretary type the memorandum out, today, and have Mr. Larrazolo furnish me with one, Wednesday?

Mr. Larrazolo: If the Court please, may I suggest this, I would like to get a copy of their memorandum, before I submit one.

The Court: That is exactly what I said. It is just what I said; exactly what I said, and I will write an Opinion in Albuquerque, on the thing.

Mr. McKenna: Whatever the Opinion, if you are pressed for time and would rather we submit a memorandum——

The Court: Not only pressed for time. I have none. And you keep it with the Secretary of the Treasury, in the meantime, until I have an Order, one way or another.

Mr. McKenna: Could we have an Order of this Court, so the matter would be held in status quo, Mr. Salter would not, in any manner, give any testimony, and not further participate in any proceedings, until this matter is decided?

The Court: Here is the difficulty, suppose you get Judge Brown, Judge Arledge, or Judge Swope, and they get started, I haven't any control over them.

Mr. McKenna: I believe you have, Your Honor, that is our position.

The Court: I never felt any Federal Court had any control over me, when I was State Judge, and I still have that idea.

Mr. McKenna: Your Honor, the Constitution—(Interrupted).

The Court: I don't care, but just a second, they are in-

dependent folks. The only thing is the use of this evidence. That is the only thing I am restricting it to.

Mr. McKenna: Is there a possibility you will restrict him from testifying?

The Court: No, I am not going to.

Mr. Larrazolo: He would be in contempt.

[fol. 15] The Court: I am not going to confine him.

Mr. McKenna: I think there might be irreparable harm to the defendant.

The Court: He won't have any evidence show up.

Mr. Larrazolo: If the Court please, may I also state this, that our position is that in as much as that evidence is in the custody of the Secretary of the Treasury of the United States, that we have no control, that if he orders it sent to the State Court, I don't know how I can stipulate for him not to do it.

The Court: Well, I will tell you, who is the individual that has those?

Mr. Larrazolo: Mr. Salter is holding it for the Secretary Your Honor. That is his regulations, and he has got to turn that over to whoever the Secretary of the Treasury instructs.

The Court: Well, you better tell the Secretary of the Treasury to be careful. I don't want that Secretary of the Treasury turning it over to the State Court, until I decide this.

Mr. Larrazolo: I might state that the Secretary of the Treasury is not a party to this.

The Court: No, let's tell him I want that to stay there, but I have no control over State Courts. Get in your memorandum, there, and then we will be able to decide it.

Mr. McKenna: May I make one further remark? The record will show, in view of the possible irreparable harm to my client, during this interim, I respectfully wish to except to the Court's refusal to give us the complete relief of that nature.

The Court: Sure, sure, you called it to my attention. You called it to my attention. No, you tell that fellow, the Secretary of the Treasury, to keep that here for a while. We haven't any term of Court until fall, anyway. In the State Court. Third Monday is the beginning of the term, there. Let's take things easy. We are making too much

[fols. 16-19] out of this case. When I get around to it, I will decide it. Everybody understand what I mean? I don't want anybody fooling around, here, somebody will get burned. All right.

(Whereupon, at 10:12 o'clock A.M., June 28th, 1954, Court was recessed.)

Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 20] MINUTE ENTRY OF ARGUMENT AND SUBMISSION—November 18, 1954 (Omitted in Printing)

[fol. 21] IN UNITED STATES COURT OF APPEALS, TENTH CIRCUIT, NOVEMBER TERM, 1954

No. 4974

DANTAN GEORGE REA, Appellant,

vs.

UNITED STATES OF AMERICA, Appellee.

Appeal from the United States District Court for the District of New Mexico

OPINION—December 23, 1954

Joseph A. Sommer (Thomas F. McKenna was with him on the brief) for Appellant;

James A. Borland, Ass't United States Attorney (Paul F. Larrazolo, United States Attorney, was with him on the brief) for Appellee.

Before Huxman, Murrah and Pickett, United States Circuit Judges.

HUXMAN, Circuit Judge:

An indictment was filed against appellant, Dantan George Rea, in the United States District Court for the District of New Mexico, charging him with unlawfully acquiring

marihuana without having paid the transfer tax required by law, in violation of 26 U.S.C.A. § 2593 (a). The evidence upon which the prosecution was predicated was obtained as the result of an illegal search pursuant to a void [fol. 22] search warrant. After a plea of not guilty, appellant moved that the search warrant issued and all property seized pursuant thereto be suppressed as evidence against him "in any criminal proceeding including the above entitled action." The trial court suppressed the evidence with the result that the district attorney, being deprived of the use of his evidence, at the same time moved for a dismissal of the action. Such an order was entered by the court. Thereafter, on August 13, 1953, Narcotics Agent Salter swore to a complaint before a Justice of the Peace of New Mexico, stating that appellant was in possession of marihuana, in violation of Section 71-636 N.M.S.A., 1941, Compiled. Appellant was arrested on the warrant and complaint issued and he is now awaiting trial in the State Court of New Mexico. The case against him there is presumably predicated on the testimony of Narcotics Agent Salter and the evidence seized by him.

On June 21, 1954, appellant filed a motion in the federal court for a contempt show cause order to be issued against Salter, to show cause why he should not be held in contempt of court and to enjoin him from testifying in the state court action with respect to the narcotics obtained by him as a result of his illegal search, and that if such evidence had been already transferred out of the custody of the United States to direct him to immediately reacquire custody and possession in the name of the United States, and to destroy the evidence or transfer it to other agents of the United States. The grounds of this motion were that the evidence had been illegally obtained and that the federal court should enjoin its use in the state tribunal. The trial court upon hearing and briefs submitted entered an order denying the relief sought on the ground that the suppression of evidence in a federal court under Rule 41 of the Federal Rules of Criminal Procedure and the Fourth Amendment to the Constitution of the United States applies only to proceedings in United States Courts and does [fol. 23] not govern the use of that evidence in a state

court. This appeal challenges the correctness of that ruling.

By his original motion appellant sought two things: first, the suppression of the evidence and the order of the court denying its use as evidence in any prosecution against him and, second, the order of the court directing the disposal of the property in question. The court entered an order suppressing the evidence but made no order with respect to the seized property.

Rule 41 (e) of the Federal Rules of Criminal Procedure empowers the court to suppress evidence obtained in violation of one's rights under the Fourth Amendment to the Constitution and to order its return, if it is of such a nature that it can be lawfully returned. This, being marijuana, was contraband and could not be lawfully returned to appellant. When Rea obtained an order suppressing the use of the marijuana as evidence against him and the district attorney dismissed the charge, the case against him came to an end. At that point there was nothing pending against him in any court. What he sought thereafter when the state case was filed against him was an order of the district court, enjoining Salter from testifying in the state action, and a further order with respect to the disposition of the evidence which in effect would enjoin its production as evidence in the state court.

The receipt of evidence in trials in federal courts, resulting from unlawful searches and seizures by federal officers or agents, is not a violation of right guaranteed by the Fourth Amendment. The invasion of the right to sanctity and privacy of the home is complete when the unlawful search and seizure is consummated. The legal penalties which flow from such violation and which may be inflicted then become absolute, and denying the right to receive evidence thus obtained thereafter in a trial in the federal court is no part of such penalties, either under the [fol. 24] Fourth Amendment or under any law of Congress. Congress no doubt could pass a law prohibiting the use of such evidence in federal courts but this it has not done. In the absence of such a statute, the denial of the right to use the same flows from a rule of evidence fashioned by the

federal courts.[1] The rule is well stated in Shinyu Nora v. United States, 148 F. (2d) 696, as follows: "Neither the Constitution nor any statute in terms prohibits the use of the truth, even though unlawfully discovered, as evidence in the prosecution of a crime; but it is a federal judicial policy not to allow the agents and officers of the United States to break the law themselves and then use information so acquired to prosecute others."

The prohibition against the use of such evidence is limited to trials in the federal courts and there only when it was unlawfully obtained by federal officers or agents. It has consistently been held that evidence obtained by state officers in violation of the Fourth Amendment may be received in trials in federal courts[2] and that evidence unlawfully obtained by federal officers may be used in state trials, when not in contravention of state law.[3]

We cannot agree that the relief sought is merely incidental to the order of suppression. While the motion for suppression sought the suppression of the evidence "in any criminal proceeding including the above entitled action," we think it must be construed as being limited to actions by the federal government in federal courts. That is the interpretation placed upon the order of suppression [fol. 25] by the judge who entered it, when in denying relief under this motion he stated that the motion to suppress was sustained "only insofar as the Court therein and thereby prohibited the introduction of the evidence thereby obtained by Agent Jack Salter through an illegal federal search warrant in this court and *had no bearing whatso-*

---

[1] Weeks v. United States, 232 U. S. 283;
Wolf v. Colorado, 338 U. S. 25, and cases there cited.

[2] Byars v. United States, 273 U. S. 28;
Taylor v. Hudspeth, 113 F. (2d) 825;
United States v. Butler (10th Cir), 156 F. (2d) 897;
Jaroshuk v. United States, 201 F. (2d) 52;
Rettich v. United States, 84 F. (2d) 118.

[3] Terrano v. State (Nevada), 91 P. (2d) 67;
State v. Gardner (Montana), 249 P. 574;
Com. v. Colpo, 98 Pa. Superior Ct., 460, Cert. Denied, 282 U. S. 863.

ever on the use of said evidence in the State Courts of New Mexico, the Court only suppressing the use of said evidence in the United States District Court for the District of New Mexico."

Whether evidence unlawfully obtained by federal officers or agents in violation of the Fourth Amendment is admissible in state criminal trials depends upon the state constitution, state statutes, decisions by its courts, or state rules of evidence. If not prohibited by one of these, its receipt in evidence does not violate any right guaranteed the accused by the federal Constitution, its laws, decisions of its courts, or its rules of evidence. But assuming without so deciding that the district court under its general equity power had the authority to provide for the destruction of this evidence for the admitted purpose of preventing its use by the state and the power to enjoin Salter from testifying in the state action, if subpoenaed therein, we are of the view that it should not have done so.

While the facts in Stefanelli v. Minard, 342 U.S. 117, differ slightly from the facts before us in that there the plaintiff sought an injunction enjoining state officers from using evidence in a state prosecution which had been obtained in violation of the Federal Civil Rights Act, while here the evidence was obtained by a federal officer in violation of the Fourth Amendment, we think the reasoning of that case has force and applicability here. The court concluded that even if the power to enjoin the state officers might fairly and constitutionally be derived from the generality of language of the Act, to grant the relief would disregard the power of courts of equity to exercise discretion, when in the exercise of such discretion the bal-[fol. 26] ance is against the wisdom of using it. The court alluded to the delicate balance between state and federal judicial systems and how great care and discretion was necessary to preserve harmonious relationships between the two systems. The court reaffirmed the principle that "federal courts should refuse to intervene in State criminal proceedings to suppress the use of evidence even when claimed to have been secured by unlawful search and seizure." Say what you will, the effect of the relief sought would make impossible the prosecution by the state of its action against apellant. That is the purpose and the only

purpose sought to be accomplished by this proceeding and such an order would constitute an interference with the state judicial process.

Again assuming without deciding that the use of the void warrant and the evidence seized thereunder would violate some federal constitutional right of appellant, denying him the relief which he seeks would not leave him without remedy. He could urge that, as he should, in the state trial [4] and, if denied relief there, could then appeal to the Supreme Court.

The quotation from the opinion in Silverthorne Lumber Company v. United States, 251 U.S. 385, that "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the court *but that it shall not be used at all*" does not support appellant's theory. In that case documents were unlawfully seized. They were photostated and the originals were then returned by order of the court and the Government sought to use the photostatic copies and what the opinion means is that the Government could not use that evidence in any way.

Affirmed.

[fol. 27] In United States Court of Appeals for the Tenth Circuit

Judgment—December 23, 1954

This cause came on to be heard on the transcript of the record from the United States District Court for the District of New Mexico and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the order of the said district court in this cause of July 2, 1954, denying motion to show cause be and the same is hereby affirmed.

[fol. 28] Clerk's Certificate to foregoing transcript omitted in printing.

---

[4] See Douglas v. Jeanette, 319 U. S. 157.

[fols. 29-30] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1954

No. 555

DANTAN GEORGE REA, Petitioner,

vs.

UNITED STATES OF AMERICA

ORDER ALLOWING CERTIORARI—Filed March 7, 1955

The petition herein for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(2153-5)

LIBRARY
SUPREME COURT, U.S.

Office-Supreme Court, U. S.
FILED
JAN 19 1955
HAROLD B. WILLEY, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1954

No. 530

DANTAN GEORGE REA, PETITIONER,

v.

UNITED STATES OF AMERICA, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

THOMAS F. MCKENNA,
JOSEPH A. SOMMER,
302 E. Palace Avenue,
Santa Fe, New Mexico,
Counsel for Petitioner.

EASTWOOD PRINTING CO., 2031 CURTIS STREET, DENVER

INDEX

	PAGE
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Provisions of the Constitution and Status Involved	2
Statement of the Case	3
Argument:	
I. Whether the Federal Government, through Its Agents, May Make Available to a State Court for a Criminal Prosecution, Physical and Testimonial Evidence That Has Been Suppressed as in Violation of the Fourth Amendment, Is an Important Constitutional Question Which Should Be Settled by This Court	6
II. The Rationale of the Lower Court Is in Conflict with Applicable Decisions of This Court	9
Conclusion	14
Appendix	15

TABLE OF CASES

Amos v. United States, 255 U.S. 313	13
Burdeau v. McDowell, 256 U.S. 465	11
District of Columbia v. Little, 85 U.S. App. D.C. 242, 178 F. 2d 13 affirmed (on other grounds), 339 U.S. 1	12
Go-Bart v. United States, 282 U.S. 344	**8, 9, 10, 11**
Gouled v. United States, 255 U.S. 298	**13**
Lustig v. United States, 338 U.S. 74	13

INDEX (CONTINUED)

	PAGE
Raffaele v. Granger, 196 F. 2d 620	6
Silverthorne Lumber Company v. United States, 251 U.S. 385	11, 12, 13
State v. Dillon, 34 N.M. 366, 281 Pac. 474	13
Stefanelli v. Minard, 342 U.S. 117	6, 8
Trupiano v. United States, 334 U.S. 699	9, 12
United States v. Coplan, 185 F. 2d 629 (C. A. 2nd), certiorari denied, 342 U.S. 920	13
Weeks v. United States, 232 U.S. 383	7, 10, 11, 13
Weinberg v. United States, 126 F. 2d 1004 (C. A. 2nd)	11
Wolf v. Colorado, 338 U.S. 25	7, 10, 11

CONSTITUTIONAL AND STATUTORY PROVISIONS CITED

Fourth Amendment	2, 4, 5, 6, 7, 8, 9
Fifth Amendment	3, 7, 12
Rule 41(e), Federal Rules of Criminal Procedure (18 U.S.C. Section 3771)	3, 5, 6, 9
18 U.S.C., Section 3231	5
18 U.S.C., Section 401	5
26 U.S.C., Sections 2590-2596, 1939 Internal Revenue Code	6
26 U.S.C., Section 2593(a), 1939 Internal Revenue Code	3
28 U.S.C., Section 1254(1)	2
28 U.S.C., Section 2463	5, 6
42 U.S.C., Section 1988	5
Section 71-636, New Mexico Statutes Anno., 1941 Comp.	4

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1954.

No.

DANTAN GEORGE REA, PETITIONER,

v.

UNITED STATES OF AMERICA, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit (R. 2-7)[1] has not been reported and is set out as Appendix A. The opinion of the United States District Court for the District of New Mexico is unreported and is contained in the Record as printed for the use of the Court of Appeals (R. 7-8).

[1] This reference is to the transcript of record of the proceedings in the United States Court of Appeals for the Tenth Circuit. All other references, unless otherwise indicated, are to the transcript of record of the proceedings in the trial court.

JURISDICTION

The judgment of the Court of Appeals was entered on December 23, 1954 (R. 2)[2].

The jurisdiction of this Court is conferred by 28 U.S.C., Section 1254 (1).

QUESTIONS PRESENTED

1. Whether the Fourth and Fifth Amendments of the Constitution prohibit the use of evidence, seized by an agent of the United States pursuant to a void Federal search warrant and suppressed by a United States District Court, in a state criminal trial where the evidence remains in the custody of the United States and in the possession of its agents.

2. Whether the Fourth and Fifth Amendments of the Constitution prohibit an agent of the United States from testifying in a state criminal trial as to evidence obtained by him in his capacity as Federal agent in the course of a search adjudged by a United States District Court to be in violation of the Fourth Amendment.

3. Whether a prior order of a United States District Court suppressing illegally obtained evidence in any criminal proceeding, including the criminal action then pending in such court, and Rule 41(e) of the Federal Rules of Criminal Procedure, apply to the use of such evidence in a state criminal trial.

PROVISIONS OF THE CONSTITUTION AND STATUTES INVOLVED

Fourth Amendment:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall

[2]Record of Proceedings in the Court of Appeals.

issue, but upon probable cause, supported by oath or affirmation, and particularly described the place to be searched, and the persons or things to be seized.

Fifth Amendment:

No person * * * shall be compelled in any criminal case to be a witness against himself, nor deprived of life, liberty or property without due process of law; * * *

Rule 41 (e), Federal Rules of Criminal Procedure (18 U.S.C., Section 3771):

Motion for Return of Property and to Suppress Evidence. A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant, or (2) the warrant is insufficient on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or (5) the warrant was illegally executed. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. The motion to suppress evidence may also be made in the district where the trial is to be had. * * *.

STATEMENT OF THE CASE

Petitioner was indicted in the United States District Court for the District of New Mexico on September 12, 1953, for acquiring marihuana on August 13, 1953, without having paid the transfer tax required by law, in violation of Title 26, U.S.C. Section 2593 (a), 1939 Internal Revenue Code (R. 2). Following a plea of not guilty

(R. 2-3), petitioner moved that the search warrant issued by the United States Commissioner to Federal Narcotics Agent Salter be quashed, and that all property seized pursuant to said warrant from petitioner's home in Albuquerque, New Mexico, be suppressed as evidence against petitioner "in any criminal proceeding including the above-entitled action" (R. 3-4). The grounds relied upon were that the search and seizure were "in violation of his rights under the Fourth Amendment to the Constitution" (R. 4). After hearing, and on June 18, 1954, the United States District Court for the District of New Mexico granted the motion in the form in which it was made (R. 4). Thereupon, the United States moved to dismiss the indictment, and it was dismissed (R. 4-5).

On the same day that the District Court suppressed the evidence, Narcotics Agent Salter with knowledge of or in anticipation of the District Court's Action, went before a Justice of the Peace of New Mexico, made an affidavit that petitioner had been in possession of marihuana on August 13, 1953; and procured the issuance of a warrant for petitioner's arrest for possession of marihuana in violation of Section 71-636, New Mexico Statutes Anno., 1941 Comp. (R. 6). Petitioner was arrested on the charge made by the Federal agent and is awaiting trial (R. 7). It was stipulated by the United States Attorney that Narcotics Agent Salter "is about to prosecute for the same offense, in the State Court with the same evidence" as was suppressed (Supp. R. 3). The suppressed evidence remains in the physical possession of the Narcotics Agent, who holds it in his capacity as a Federal officer and pursuant to regulations and laws of the United States (Supp. R. 5; R. 6). The knowledge that formed the basis of the state charge sworn to by the Federal Agent was obtained solely as a result of his illegal search and seizure (R. 7).

Based on the foregoing, petitioner promptly made a motion on June 21, 1954, that an order to show cause be

issued and served upon Narcotics Agent Salter why he should not be held in contempt for violating the order of suppression, and forbidding and enjoining him from testifying "as to the existence, character, possession of, or facts about the aforesaid suppressed evidence, and from transferring said evidence out of the legal custody of the United States" (R. 5-6). The motion sought such further order as was necessary to protect petitioner's constitutional rights and to enforce the previous order of suppression (R. 6). To determine the existence of the grounds relied upon by petitioner, a hearing was requested (R. 6).

Agent Salter and the United States Attorney appeared at a hearing on the matter (Supp. R. 3). After submission of briefs, the District Court wrote an opinion in which he noted the absence of any precedent in the United States District Courts for the precise question presented, but denied in its entirety the relief sought in petitioner's motion (R. 8). The grounds of his decision were that neither the Fourth Amendment nor Rule 41 of the Federal Rules of Criminal Procedure affected the use in a state court of evidence previously suppressed in Federal court (R. 8). Accordingly, the District Court, on July 2, 1954, issued an order denying petitioner's motion and purporting to limit his previous order of suppression to use of evidence in the United States District Court of New Mexico only (R. 9). On July 12, 1954, petitioner filed a timely notice of appeal (R. 9-10).

The basis for federal jurisdiction in the trial court may be found in 18 U.S.C. Section 3231, Rule 41(e) of the Federal Rules of Criminal Procedure, at 18 U.S.C. Section 3771, 18 U.S.C., Section 401, 42 U.S.C., Section 1988, and 28 U.S.C., Section 2463.

The United States Court of Appeals for the Tenth Circuit affirmed on the grounds that the Fourth Amendment does not prohibit the use of unconstitutionally obtained evidence in any court, State or Federal, and that

the evidentiary rule of exclusion in Federal courts is solely a matter of Federal judicial policy, and hence inapplicable to a state trial. It held that evidence obtained in violation of the Fourth Amendment by the Federal government could be used in a State trial without violating any right guaranteed the petitioner under the Federal Constitution, its laws, or its rules of evidence. Alternatively, it upheld the lower court's decision as an exercise of discretion, controlled by *Stefanelli v. Minard*, 342 U.S. 117, in that a prohibition upon a Federal officer would interfere with a state prosecution.

ARGUMENT

I.

Whether the Federal Government, through Its Agents, May Make Available to a State Court for a Criminal Prosecution, Physical and Testimonial Evidence That Has Been Suppressed as in Violation of the Fourth Amendment, Is an Important Constitutional Question Which Should Be Settled by This Court.

The evidence in question was seized and detained in the enforcement of a revenue law of the United States, namely, 26 U.S.C. Sections 2590-2596, 1939 Internal Revenue Code, and was therefore "deemed to be in the custody of the law and subject only to the orders and decrees of the courts of the United States having jurisdiction thereof." 28 U.S.C., Section 2463. As the seizure was made in New Mexico, and the property seized remained in that state in the physical possession of the Federal officer, the District Court of New Mexico possessed jurisdiction over it. *Raffaele v. Granger*, 196 F. 2d 620, 623. See also Rule 41(e), Federal Rules of Criminal Procedure. Thus, the disposition or use of the illegally seized evidence is controlled by Federal law, that is, the Federal Constitution and Federal Statutes, and cannot be reached by the subpoena power of a state court unless permitted by the Fed-

eral court. Without the concurrence and permission of Federal authority, the state courts cannot reach the evidence.

The constitutional issue presented therefore is whether the Federal Government is barred by the Fourth and Fifth Amendment from permitting the use by a state court of evidence which it admittedly cannot use in its own courts under the doctrine of *Weeks v. United States*, 232 U.S. 383.

The question is important in the enforcement of rights guaranteed under the Fourth and Fifth Amendments. The remedy considered essential to compelling observance of constitutional rights *by Federal officers* has been to deprive the Government of the right to use the evidence so obtained, damages being considered wholly inadequate protection. See *Wolf v. Colorado*, 338 U.S. 25. "The public opinion of a community can far more effectively be exerted against oppressive conduct on the part of police directly responsible to the community itself than can local opinion, sporadically aroused, be brought to bear upon remote authority pervasively exerted throughout the country." *Wolf v. Colorado, supra*, at pp. 32-33. The inability of Federal law enforcement officers to profit by an unconstitutional search and seizure or by a coerced confession has been the greatest assurance of a United States citizen that his rights will be observed by Federal law-enforcement officers. If Federal law-enforcement officers may exert the power of the Government to invade one's home, and the Federal Government then be free to hand the suppressed fruits of the search and seizure on a silver platter to state courts, the deterrent to observe Federal rights is seriously impaired. This is particularly true where the areas of Federal and state jurisdiction so frequently overlap, as in narcotics violations, kidnapping, transportation of stolen property, national bank robberies, blackmail, income tax evasion, liquor law violations, gambling and other offenses too numerous to mention. The

doctrine that the Federal Government has the right to make use of evidence illegally secured and so determined and ordered suppressed by a Federal Court for a state prosecution would be a direct incentive to treat with indifference, if not outright hostility, Federally-protected rights, secure in the knowledge that, if the Federal Government could not prosecute, a state government could, in those cases where the crime has both a Federal and state aspect.

What has been said as to the protection afforded to Constitutional rights by prohibiting *any* use of the evidence, applies with equal force to testimonial evidence as to physical evidence. To permit Federal officers to use their knowledge thus gained to convict one in state courts would encourage a violation of the right against an unreasonable search and seizure.

The point of the matter is that evidence illegally secured by the Federal officer was suppressed by the United States District Court as being violative of the Fourth Amendment and the invading officer who took an oath to support and defend the Constitution, with knowledge of the suppression or in anticipation of it, not only instituted the State action but plans to make the suppressed evidence available to the State Court and to testify concerning it.

The exact question presented has not been decided by this Court. The Court of Appeals invoked *Stefanelli v. Minard*, 342 U.S. 117, in support of its position, stating that "while here the evidence was obtained by a federal officer in violation of the Fourth Amendment, we think the reasoning of that case has force and applicability here." The *Stefanelli* case involved a refusal to enjoin state officials in a state prosecution, and to sanction "the active intrusion of the federal courts in the administration of the criminal law for the prosecution of crimes solely within the power of the States." Here there is no

interference with any state officer. The power of the Federal Court would be exerted solely on the Federal Government and its agents, as it is when the latter are ordered to return seized property that is not contraband. See *Go-Bart Co. v. United States*, 282 U.S. 344.

If suppression of evidence in the hands of Federal agents is an interference with state prosecutions, then so is a return of the property where the state might desire to subpoena it for use in trial. Thus, if the *Stefanelli* case has been correctly applied by the lower court to a case where evidence has been suppressed, by holding that it is an interference with state prosecutions not to make *suppressed* evidence available, then logic demands that it be applied in the ordinary case where a *return* of property is ordered. An aggrieved person's right to a return of illegally seized property, as well as a suppression, would be subject to prior rights of a state court to reach the property in the hands of the United States. This is so because the Fourth Amendment extends the same protection to contraband as to ordinary property. *Trupiano v. United States*, 334 U.S. 699. The doctrine that an individual's right to a return and suppression of evidence is limited by the right of a state to obtain the same evidence for a state prosecution is both a novel proposition and a dangerous inroad on Constitutional rights, which should be reviewed by this Court.

II.

The Rationale of the Lower Court Is in Conflict with Applicable Decisions of This Court.

The construction by the Court of Appeals of the Fourth Amendment, of Rule 41(e), and of the order suppressing the evidence "in any criminal proceeding including the above-entitled action," was that they involved only a rule of evidence applicable to Federal criminal trials, imposed as a matter of Federal judicial policy. If that premise is granted, the conclusion reached by the

lower court might follow. Petitioner submits, however, the foundation of the decision is erroneous and in conflict with applicable decisions of this Court.

The following excerpt discloses the basis of the lower court's decision:

> "The receipt of evidence in trials in federal courts, resulting from unlawful searches and seizures by federal officers or agents, is not a violation of rights guaranteed by the Fourth Amendment."

If the Constitution does not forbid the Federal Government to use evidence illegally seized in its own courts, then the Court reasoned that *a fortiori* it does not prohibit the Federal Government's making such evidence available for use by a state court.

In support of this major premise, *Weeks v. United States*, 232 U.S. 383 and *Wolf v. Colorado*, 338 U.S. 25, and cases there cited, were relied upon. The *Weeks* case is quite to the contrary. Its holding is as follows (at p. 398):

> "We therefore reach the conclusion that the letters in question were taken from the house of the accused by an official of the United States acting under color of his office in direct violation of the constitutional rights of the defendant; that having made a seasonable application for their return, which was heard and passed upon by the court, *there was involved in the order refusing the application a denial of the constitutional rights of the accused, and that the court should have restored these letters to the accused.*" (Emphasis added.)

From the foregoing it appears that the order made before trial constituted a denial of the aggrieved person's rights under the Fourth Amendment. Had there never been a trial, the Fourth Amendment would have entitled the victim to a return of his property, *Go-Bart Co. vs.*

United States, 282 U.S. 344, and the refusal to return the papers would infringe the Fourth Amendment even if the defendant, at trial, were not convicted, or the evidence were not used against him. If, as held by the lower court, suppression of seized properties is solely a right conferred by a Federal evidentiary policy, then there could be no right apart from that policy to have property returned and suppressed *unless it is known that there will be a prosecution at which it can become evidence.* Yet this Court has recognized such a right to a return. *Go-Bart Co. v. United States, supra; Burdeau v. McDowell*, 256 U.S. 465. See also Rule 41(e) permitting the suppression and return of evidence in the District of seizure even where prosecution will be elsewhere, if at all. *Weinberg v. United States*, 126 F. 2d 1004 (C.A. 2d).

That the prohibition against use of the evidence is constitutional, may be gathered from the cogent language employed in the *Weeks* case (at p. 393):

> "If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution."

In *Wolf v. Colorado, supra*, Mr. Justice Frankfurter said (at p. 28):

> "In *Weeks v. United States, supra*, this Court held that in a federal prosecution the Fourth Amendment barred the use of evidence secured through an illegal search and seizure."

See also *Silverthorne Lumber Company v. United States*, 251 U.S. 385, in which Mr. Justice Holmes said (at p. 392):

"The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court *but that it shall not be used at all.*" (Emphasis added.)

The effect of the lower court's decision is to remove all restrictions on the Federal Government's use of illegally obtained evidence except use in its own courts. This interpretation limits the protection of the Fourth Amendment solely to instances where the Fifth is also involved, and strips it of any independent vitality. "The basic premise of the prohibition against searches is not protection against self-incrimination; it was the common law right of a man to privacy in his home, a right which is one of the indispensable ultimate essentials of our concept of civilization." *District of Columbia v. Little*, 85 U.S. App. D.C. 242, 246, 178 F. 2d 13, affirmed (on other grounds), 339 U.S. 1. In the last named case, the Court specifically rejected the argument advanced by the Government "that the Fourth Amendment provision regarding searches is premised upon and limited by the Fifth Amendment provision regarding self-incrimination."

Petitioner submits that the decision of the lower court is in direct conflict with the principle of *Silverthorne Lumber Company v. United States*, *supra*, forbidding not just the use of illegally obtained evidence before the Federal court, but requiring of the Federal Government "that it shall not be used at all." The *rationale* of all of this Court's decisions requiring a return (where no contraband is involved) and suppression of evidence unconstitutionally seized (even where contraband is involved, *Trupiano v. United States*, *supra*) is that the aggrieved party should be placed in the *status quo* occupied by him, before the search and seizure, and that the Federal Government make *no* use of its ill-gotten evidence.

The contention that a suit for damages adequately

protected such a person's rights against invasion by the Federal Government was laid to rest with the *Weeks* case. Yet that is the remedy to which this petitioner would be left since the courts of New Mexico will convict on evidence that is unconstitutionally obtained. *State v. Dillon*, 34 N.M. 366, 281 Pac. 474. Hence, the petitioner would not be restored to the *status quo*, as were the persons in other search and seizure cases before this Court. See *Weeks v. United States*, *supra*; *Silverthorne Lumber Company v. United States*, *supra*; *Go-Bart Co. v. United States*, supra; *Gouled v. United States*, 255 U.S. 298; *Amos v. United States*, 255 U.S. 313.

In addition, the United States here violates the fundamental principle of seeking to profit by its own wrong, and maintains that, by its wrong it acquired a right to make use of what it never should have acquired initially. See *United States v. Coplan*, 185 F. 2d 629, 640 (C.A. 2nd), certiorari denied, 342 U.S. 920, for a statement of the principle prohibiting the Government to profit by using in any way what "would not have been found, if officials had not violated the laws designed to deny them access to it." Whether the fruits of the unconstitutional seizure are made use of by the Federal Government in its own courts or in the courts of the State of New Mexico, it is the United States which is the means and instrumentality by which the evidence is made available to the State.

In *Lustig v. United States*, 338 U.S. 74, 79, this Court made the test of whether the Federal Government had participated in an illegal search the "actuality of a share by a Federal official in the total enterprise." Here a Federal Official, ten months after obtaining the evidence, uses it to initiate a state prosecution, and proposes to furnish, from the custody of the Federal Government, the sole means of a state conviction. To the extent that the evidence would not have been uncovered but for the Federal Government's wrong, and would not be now available but for the action in supplying the sole means to initiate

and prosecute the state criminal action, there is certainly "a share by a Federal official in the total enterprise" of prosecuting.

The United States in both lower courts has therefore asserted a right to make use of the fruit of its wrong, contrary to the principle of the *Silvertharne* case. Thus, the issue squarely presented for review by this Court is whether the sole consequence to the Government of an illegal search and seizure is exclusion under an evidentiary rule in Federal courts, imposed as a matter of judicial policy in Federal court trials, or whether it is a Constitutional prohibition against the Federal Government's use of the evidence for all purposes. It is submitted that the position of the lower court on this issue was in direct conflict with the rationale and reasoning of the opinions of this Court, and therefore should be reviewed.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

THOMAS F. MCKENNA.

JOSEPH A. SOMMER.
302 E. Palace Avenue,
Santa Fe, New Mexico,

Counsel for Petitioner.

APPENDIX A

[Opinion.]

HUXMAN, Circuit Judge.

An indictment was filed against appellant, Dantan George Rea, in the United States District Court for the District of New Mexico, charging him with unlawfully acquiring marihuana without having paid the transfer tax required by law, in violation of 26 U.S.C.A. § 2593 (a). The evidence upon which the prosecution was predicated was obtained as the result of an illegal search pursuant to a void search warrant. After a plea of not guilty, appellant moved that the search warrant issued and all property seized pursuant thereto be suppressed as evidence against him "in any criminal proceeding including the above entitled action." The trial court suppressed the evidence with the result that the district attorney, being deprived of the use of his evidence, at the same time moved for a dismissal of the action. Such an order was entered by the court. Thereafter, on August 13, 1953, Narcotics Agent Salter swore to a complaint before a Justice of the Peace of New Mexico, stating that appellant was in possession of marihuana, in violation of Section 71-636 N. M. S. A., 1941, Compiled. Appellant was arrested on the warrant and complaint issued and he is now awaiting trial in the State Court of New Mexico. The case against him there is presumably predicated on the testimony of Narcotics Agent Salter and the evidence seized by him.

On June 21, 1954, appellant filed a motion in the federal court for a contempt show cause order to be issued against Salter, to show cause why he should not be held in contempt of court and to enjoin him from testifying in the state court action with respect to the narcotics obtained by him as a result of his illegal search, and that if such evidence had been already transferred out of the

custody of the United States to direct him to immediately reacquire custody and possession in the name of the United States, and to destroy the evidence or transfer it to other agents of the United States. The grounds of this motion were that the evidence had been illegally obtained and that the federal court should enjoin its use in the state tribunal. The trial court upon hearing and briefs submitted entered an order denying the relief sought on the ground that the suppression of evidence in a federal court under Rule 41 of the Federal Rules of Criminal Procedure and the Fourth Amendment to the Constitution of the United States applies only to proceedings in United States Courts and does not govern the use of that evidence in a state court. This appeal challenges the correctness of that ruling.

By his original motion appellant sought two things; first, the suppression of the evidence and the order of the court denying its use as evidence in any prosecution against him and, second, the order of the court directing the disposal of the property in question. The court entered an order suppressing the evidence but made no order with respect to the seized property.

Rule 41 (e) of the Federal Rules of Criminal Procedure empowers the court to suppress evidence obtained in violation of one's rights under the Fourth Amendment to the Constitution and to order its return, if it is of such a nature that it can be lawfully returned. This, being marijuana, was contraband and could not be lawfully returned to appellant. When Rea obtained an order suppressing the use of the marijuana as evidence against him and the district attorney dismissed the charge, the case against him came to an end. At that point there was nothing pending against him in any court. What he sought thereafter when the state case was filed against him was an order of the district court, enjoining Salter from testifying in the state action, and a further order

with respect to the disposition of the evidence which in effect would enjoin its production as evidence in the state court.

The receipt of evidence in trials in federal courts, resulting from unlawful searches and seizures by federal officers or agents, is not a violation of rights guaranteed by the Fourth Amendment. The invasion of the right to sanctity and privacy of the home is complete when the unlawful search and seizure is consummated. The legal penalties which flow from such violation and which may be inflicted then become absolute, and denying the right to receive evidence thus obtained thereafter in a trial in the federal court is no part of such penalties, either under the Fourth Amendment or under any law of Congress. Congress no doubt could pass a law prohibiting the use of such evidence in federal courts but this it has not done. In the absence of such a statute, the denial of the right to use the same flows from a rule of evidence fashioned by the federal courts.[1] The rule is well stated in Shinyu Noro v. United States, 148 F. (2d) 696, as follows:

"Neither the Constitution nor any statute in terms prohibits the use of the truth, even though unlawfully discovered, as evidence in the prosecution of a crime; but it is a federal judicial policy not to allow the agents and officers of the United States to break the law themselves and then use information so acquired to prosecute others."

The prohibition against the use of such evidence is limited to trials in the federal courts and there only when it was unlawfully obtained by federal officers or agents. It has consistently been held that evidence obtained by state officers in violation of the Fourth Amendment may

---

[1] Weeks v. United States, 232 U. S. 383;
Wolf v. Colorado, 338 U. S. 25, and cases there cited.

be received in trials in federal courts[2] and that evidence unlawfully obtained by federal officers may be used in state trials, when not in contravention of state law.[3]

We cannot agree that the relief sought is merely incidental to the order of suppression. While the motion for suppression sought the suppression of the evidence "in any criminal proceeding including the above entitled action", we think it must be construed as being limited to actions by the federal government in federal courts. That is the interpretation placed upon the order of suppression by the judge who entered it, when in denying relief under this motion he stated that the motion to suppress was sustained "only insofar as the Court therein and thereby prohibited the introduction of the evidence thereby obtained by Agent Jack Salter through an illegal federal search warrant in this court and *had no bearing whatsoever on the use of said evidence in the State Courts of New Mexico, the Court only suppressing the use of said evidence in the United States District Court for the District of New Mexico.*"

Whether evidence unlawfully obtained by federal officers or agents in violation of the Fourth Amendment is admissible in state criminal trials depends upon the state constitution, state statutes, decisions by its courts, or state rules of evidence. If not prohibited by one of these, its receipt in evidence does not violate any right guaranteed the accused by the federal Constitution, its laws, decisions of its courts, or its rules of evidence. But assuming without so deciding that the district court under its general equity power had the authority to provide for the

---

[2]Byars v. United States, 273 U. S. 28;
Taylor v. Hudspeth, 113 F. (2d) 825;
United States v. Butler (10th Cir.), 156 F. (2d) 897;
Jaroshuk v. United States, 201 F. (2d) 52;
Rettich v. United States, 84 F. (2d) 118.

[3]Terrano v. State (Nevada), 91 P. (2d) 67;
State v. Gardner (Montana), 249 P. 574;
Com. v. Colpo, 98 Pa. Superior Ct., 460, Cert. Denied, 282 U. S. 863.

destruction of this evidence for the admitted purpose of preventing its use by the state and the power to enjoin Salter from testifying in the state action, if subpoenaed therein, we are of the view that it should not have done so.

While the facts in Stefanelli v. Minard, 342 U. S. 117, differ slightly from the facts before us in that there the plaintiff sought an injunction enjoining state officers from using evidence in a state prosecution which had been obtained in violation of the Federal Civil Rights Act, while here the evidence was obtained by a federal officer in violation of the Fourth Amendment, we think the reasoning of that case has force and applicability here. The court concluded that even if the power to enjoin the state officers might fairly and constitutionally be derived from the generality of language of the Act, to grant the relief would disregard the power of courts of equity to exercise discretion, when in the exercise of such discretion the balance is against the wisdom of using it. The court alluded to the delicate balance between state and federal judicial systems and how great care and discretion was necessary to preserve harmonious relationships between the two systems. The court reaffirmed the principle that "federal courts should refuse to intervene in State criminal proceedings to suppress the use of evidence even when claimed to have been secured by unlawful search and seizure." Say what you will, the effect of the relief sought would make impossible the prosecution by the state of its action against appellant. That is the purpose and the only purpose sought to be accomplished by this proceeding and such an order would constitute an interference with the state judicial process.

Again assuming without deciding that the use of the void warrant and the evidence seized thereunder would violate some federal constitutional right of appellant, denying him the relief which he seeks would not leave him without remedy. He could urge that, as he should, in the

state trial[4] and, if denied relief there, could then appeal to the Supreme Court.

The quotation from the opinion in Silverthorne Lumber Company v. United States, 251 U.S. 385, that "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the court *but that it shall not be used at all*" does not support appellant's theory. In that case documents were unlawfully seized. They were photostated and the originals were then returned by order of the court and the Government sought to use the photostatic copies and what the opinion means is that the Government could not use that evidence in any way.

AFFIRMED.

[4]See Douglas v. Jeanette, 319 U. S. 157.

Office - Supreme Court, U. S.
FILED
AUG 24 1955
HAROLD B. WILLEY, Clerk

BRIEF FOR THE PETITIONER

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1955

No. 30.

DANTAN GEORGE REA, PETITIONER,

vs.

UNITED STATES OF AMERICA

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

THOMAS F. McKENNA,
JOSEPH A. SOMMER,
302 East Palace Avenue,
Santa Fe, New Mexico,
Counsel for Petitioner.

EASTWOOD PRINTING CO., 2031 CURTIS STREET, DENVER

INDEX (CONTINUED)

PAGE

V. There is no warrant for limiting the previous order of the trial court and the language of Rule 41 of the federal criminal rules to a restriction on using the evidence in federal district court alone 34

Conclusion 36

CITATIONS

Constitutional Provisions:

Article VI 14, 18

Fourth Amendment 10, 11, 12, 13, 15, 16, 17, 24

Fifth Amendment 15, 16, 17, 28, 29

CASES

Adams v. Maryland, 347 U. S. 179 ..... 23, 35

Baltimore & Ohio R.R. v. Int. Com. Comm., 221 U. S. 612 15

Boske v. Comingore, 177 U. S. 459 27

Brown v. Walker, 161 U. S. 591 23

Burdeau v. McDowell, 256 U. S. 465 ..... 16, 36

Byars v. United States, 273 U. S. 28 ..... 19, 22

Comm. of Pa. v. Colpo, 98 Pa. Superior Court 460, certiorari denied, 282 U. S. 863 24

Corell v. Heyman, 111 U. S. 176 33

Dickhart v. United States, 57 App. D. C. 5, 16 F. 2d 345 17

District of Columbia v. Little, 85 U. S. App. D. C. 242, 178 F. 2d 13, affirmed, 339 U. S. 1 17

Feldman v. United States, 322 U. S. 487 25

PAGE

Go-Bart Importing Co. v. United States, 282 U. S. 344 ..... 15, 16, 25, 36

Gouled v. United States, 255 U. S. 298 ..... 12, 15, 28

Hale v. Henkel, 201 U. S. 43 15

Irvine v. California, 347 U. S. 128 30

Lane v. Wilson, 307 U. S. 268 23

Little v. State, 171 Miss. 818, 159 So. 103 24

McNabb v. United States, 318 U. S. 332 10

Mooney v. Holohan, 294 U. S. 103 22

Olmstead v. United States, 277 U. S. 438 12

Perlman v. United States, 247 U. S. 7 17

Robb v. Connolly, 111 U. S. 624 22

Rogers v. United States, 97 F. 2d 691 (C.A. 1st) 16

Shelley v. Kraemer, 334 U. S. 1 29

Silverthorne Lumber Co. v. United States, 251 U. S. 385 ..... 11, 12, 16

State v. Arregui, 44 Idaho 43, 254 Pac. 788 23

State v. Gardner, 77 Mont. 8, 249 Pac. 574 24

State v. Hiteshaw, 42 Wyo. 147, 292 Pac. 2 24

State v. Rebasti, 306 Mo. 336, 267 S. W. 858 ..... 18, 19

State v. Sheridan, 121 Iowa 164, 96 N. W. 730 12

Stefanelli v. Minard, 342 U. S. 117 ..... 31, 33

Steele v. United States, No. 1, 267 U. S. 498 16

Steele v. United States, No. 2, 267 U. S. 505 34

Terrano v. State, 59 Nev. 247, 91 P. 2d 67 24

INDEX (CONTINUED)

PAGE

Tucker v. State, 128 Miss. 211, 90 So. 845 12

United States v. Allred, 155 U. S. 591 25

United States v. Butler, 297 U. S. 1 28

United States v. Cefaratti, 91 U. S. App. D. C. 297, 202 F. 2d 13, certiorari denied, 345 U. S. 907 34

United States v. Murdock, 284 U. S. 141 ..... 29, 30

United States v. Physic, 175 F. 2d 338 (C.A. 2d) 16

United States ex rel. Touhy v. Ragen, 340 U. S. 462 ..... 28, 32

United States v. Specified Quantities of Intoxicating Liquors, 7 F. 2d 835 (C.A. 2d) 26

United States v. Wallace & Tiernan Co., 336 U. S. 793 ..... 17, 36

Walters v. Commonwealth, 199 Ky. 182, 250 S.W. 839 24

Weeks v. United States, 232 U. S. 383 ..... 10, 14

Weinberg v. United States, 126 F. 2d 1004 (C.A. 2d) 17

Wise v. Henkel, 220 U. S. 556 26

Wolf v. Colorado, 338 U. S. 25 ..... 10, 11, 24, 27

Youman v. Commonwealth, 189 Ky. 152, 224 S.W. 869 12

Statutes:

18 U. S. C. 3486 35

26 U. S. C. 2593 (a) 4

28 U. S. C. 1952 ed., Sec. 2463 ..... 26, 29

Sec. 71-636, N. M. Stat. Anno., 1941 Compilation 5

Miscellaneous:

Federal rules of criminal procedure

Rule 1 35

Rule 41 (e) 25, 34, 36

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1955

No. 30.

DANTAN GEORGE REA, PETITIONER,

vs.

UNITED STATES OF AMERICA

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the Court of Appeals (R. 14) is reported at 218 F. 2d 237. The opinion of the District Court (R. 8) is unreported.

JURISDICTION

The judgment of the Court of Appeals was entered on December 23, 1954 (R. 19). The petition for a writ of certiorari was filed on January 19, 1955. The jurisdiction of this Court rests on 28 U. S. C. 1254 (1).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

Fourth Amendment:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Fifth Amendment (in pertinent part):

No person * * * shall be compelled in any Criminal Case to be a witness against himself, * * *

28 U. S. C. 1952 ed., Sec. 2463:

> All property taken or detained under any revenue law of the United States shall not be repleviable, but shall be deemed to be in the custody of the law and subject only to the orders and decrees of the courts of the United States having jurisdiction thereof.

Internal Revenue Code of 1939:

Sec. 2590. *Tax.*

(a) *Rate.* There shall be levied, collected, and paid upon all transfers of marahuana which are required by Sec. 2591 to be carried out in pursuance of writ n order forms taxes at the following rates:

* * * * *

(2) *Transfers to others.* Upon each transfer to any person who has not paid the special tax and registered under Sec. 3230 and Sec. 3231, $100 per ounce of marahuana or fraction thereof.

(b) *By whom paid.* Such tax shall be paid by the transferee at the time of securing such order form

and shall be in addition to the price of such form. Such transferee shall be liable for the tax imposed by this section * * *.

(26 U. S. C. 1952 ed., Sec. 2590)

Sec. 2593. *Unlawful possession.*

(a) *Persons in general.* It shall be unlawful for any person who is a transferee required to pay the transfer tax imposed by Sec. 2590 (a) to acquire or otherwise obtain any marahuana without having paid such tax: * * *.

(26 U. S. C. 1952 ed., Sec. 2593)

The Federal Rules of Criminal Procedure provide, in pertinent part:

Rule 1. *Scope.*

These rules govern the procedure in the courts of the United States and before United States commissioners in all criminal proceedings, with the exceptions stated in Rule 54.

Rule 41. *Search and Seizure.*

* * * * * *

(e) *Motion for Return of Property and to Suppress Evidence.* A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant, or (2) the warrant is unsufficient on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued,

or (5) the warrant was illegally executed. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. The motion to suppress evidence may also be made in the district where the trial is to be had. The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing.

QUESTIONS PRESENTED

1. Whether a federal court should enjoin a federal officer from testifying in a state criminal trial regarding evidence which he had illegally seized under an invalid search warrant issuing out of said court, and which had been suppressed by the federal court as seized in violation of the Fourth Amendment?

2. Whether a federal court should enjoin federal officers from transferring possession of such evidence to state prosecuting officers?

STATEMENT

On September 12, 1953, an indictment was returned in the United States District Court of the District of New Mexico charging petitioner with having acquired marahuana, on August 13, 1953, without having paid the transfer tax required by law, in violation of 26 U. S. C. 2593 (a), 1939 Internal Revenue Code (R. 2). Following a plea of not guilty (R. 2-3), petitioner moved to quash the search warrant issued by the United States Commissioner to narcotics agent Salter, and to suppress "as evidence

against him in any criminal proceeding", including the pending action, all property taken from petitioner's Albuquerque home by narcotics agent Salter pursuant to the search warrant (R. 3). The grounds petitioner relied upon for the suppression were that the search and seizure "was in violation of his rights under the Fourth Amendment" (R. 4.) After hearing, the District Court granted the motion to quash and suppress, and, on the Government's motion, dismissed the indictment (R. 4-5).

Immediately thereafter, and ten months subsequent to the illegal search and seizure itself, the narcotics agent went before a Justice of the Peace of New Mexico, made an affidavit that petitioner had been in possession of marahuana on August 13, 1953, and procured the issuance of a warrant for petitioner's arrest for possession of marahuana in violation of Section 71-636, N. M. Stat. Anno., 1941 Compilation (R. 7, 11). On the basis of this complaint, petitioner was arrested and is now awaiting trial by the State of New Mexico (R. 7).

On June 21, 1954, the petitioner moved that (1) an order issue and be served upon the narcotics agent to show cause why he should not be held in contempt for violating the order of suppression, (2) an order issue to restrain narcotics agent Salter from testifying about the existence, character, possession of, or facts about the suppressed evidence in state court, and (3) an order issue to enjoin the transfer of the physical evidence that had been suppressed out of the legal custody of the United States (R. 5). The motion requested such further relief as was necessary to protect petitioner's Constitutional rights and to enforce the previous order of the District Court suppressing the evidence (R. 6).

At a hearing on the matter, at which the narcotics agent and the United States Attorney appeared, it was

stipulated that narcotics agent Salter was "about to prosecute for the same offense, in the State Court with the same evidence", which had not yet been transferred to the State of New Mexico (R. 11). His testimony is essential to the state prosecution for the reason that only the agent can identify the evidence that was transferred to the government chemist (R. 12). The District Court denied the motion in its entirety and purported to limit its previous order of suppression of the evidence to "its use in the United States District Court for the District of New Mexico" (R. 8-9). Its unreported opinion held that (R. 8):

> "* * * suppression of evidence in a Federal Court, under Rule 41 of the Federal Rules of Criminal Procedure, and the Fourth Amendment to the Constitution of the United States, applies only to proceedings in a United States District Court, and does not govern the use of that evidence in a State Court".

On appeal, the United States Court of Appeals affirmed the order (R. 19).

SUMMARY OF ARGUMENT

I

The prohibition against the use of illegally obtained evidence is imposed by the Constitution itself, and not merely by the courts as a rule of evidence. The right to have evidence returned or suppressed is an essential ingredient of the constitutional guarantee against unreasonable searches and seizures, without which the Fourth Amendment is a dead letter. Denial of *any* use whatsoever from illegally obtained evidence has been held by this Court to be the only effective means of enforcing the provisions of the Fourth Amendment and discouraging federal officers from violating rights guaranteed by this

amendment. If such evidence may be used in state courts, then a large portion of the sanction will be removed that now deters federal officers from illegal searches and seizures.

The argument that the only use prohibited is the receipt in evidence in a federal criminal trial is based on the false premise that the Fourth Amendment only guards against an unreasonable search and seizure that results in self-incrimination, whereas the Fourth Amendment protects against such illegal invasions for all purposes. It is not limited to a situation where the Government seeks to incriminate one, but protects the aggrieved person in civil trials and in state courts as well.

A state court, as well as a federal court, is obliged to ban the admission of evidence obtained by the Federal Government in defiance of the Fourth Amendment. This is because the Constitution is the Supreme Law of the land, equally binding on state courts. Suppression being an essential part of the constitutional right, it is a remedy available in a state trial.

The fact that a federal court may receive evidence seized in violation of the state constitution is immaterial, since in such case there has been no violation of the federal constitution.

II

When an illegal search and seizure is perpetrated by virtue of an invalid warrant, issued by a United States Commissioner, the court whose process has been abused should correct the wrong by quashing the warrant and restoring the *status quo*. This is simply the exercise of its inherent authority to control its own process, and the officers who carry out such process.

Even if a state court, if it succeeded in obtaining evidence from the control of the federal court, might validly use such evidence to convict, the federal court still has an obligation not to make such evidence available. This is analogous to the duty of the Federal Bureau of Investigation to refuse to produce confidential reports in state courts, despite the fact that, if illegally produced, they could be received in evidence.

III

The action of the United States, through its courts and agents, in supplying evidence for a state prosecution that was obtained by an illegal search and seizure, constitutes compulsory self-incrimination. While this may not violate the Fifth Amendment, because the incrimination is under the laws of a different sovereign, still the activity of the national government in compelling incrimination before a state government is not a delegated power, and is therefore in excess of its constitutional powers. Nor does the incrimination result incidentally from the exercise of a constitutional power, such as the power to tax. It cannot therefore be justified as a legitimate power of the federal government.

IV

The suppression of evidence in the custody of the Federal Government is not an interference with state prosecuting authorities. The evidence is already in federal control, and the injunction sought will not operate in any way on state officials.

In addition, the state prosecution will no more be frustrated in this case than in the ordinary instance of returning non-contraband evidence, which also deprives the state courts of its use. Where property is returned and suppressed, there is no right of a state to intervene and

defeat the privilege of the victim to obtain a restoration of his property, since the remedies of the Fourth Amendment are not subject to a state's prior right to demand illegally obtained evidence.

V

The original order of the trial court suppressed the evidence in any criminal proceeding, including but not limited to the pending case. As it became *res judicata*, the district court was powerless to amend the final order by a later order.

Under Rule 41 (e), Federal Rules of Criminal Procedure, the suppression relates to "any hearing or trial". This language is all inclusive, and is intended to be as comprehensive as the constitutional remedy itself.

ARGUMENT

I:

The Fourth Amendment Bars the Admission of Evidence Obtained by an Illegal Search and Seizure of the Federal Government in State, as Well as in Federal, Prosecutions.

A. *The Return and/or Absolute Suppression of Evidence Obtained by a Violation of the Fourth Amendment Is a Rule Imposed by the Constitution, and Not Merely a Judicially Created Rule of Evidence Applicable Solely in Federal Courts.*

Is the admission of evidence obtained by an illegal search and seizure forbidden by the Fourth Amendment itself? This is the issue squarely tendered. It was recognized as such by the Court of Appeals, which flatly held that "The receipt of evidence in trials in federal courts,

resulting from unlawful searches and seizures by federal officers or agents, is not a violation of rights guaranteed by the Fourth Amendment." (R. 16). If the Constitution would permit conviction in federal courts on evidence thus secured, the Court of Appeals reasoned that it would allow use of such evidence in state courts. In this view, the exclusion is merely a judicially created rule of evidence, no more inviolable than the rule of *McNabb v. United States*, 318 U. S. 332, 341. Since the Constitution would not render such evidence inadmissible in federal courts, the conclusion is reached that neither does it bar state courts from using the same evidence.

Although this Court has not decided the precise point at issue, the language of many of its decisions strongly suggests that the exclusionary rule is an essential and inseparable part of the constitutional right itself.

In *Weeks v. United States*, 232 U. S. 383, 393, a unanimous Court expressed that view that, if the fruit of an unconstitutional search and seizure could be admitted in evidence against a defendant; then "the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution". Elsewhere in the opinion (at page 394), it was declared that "to sanction such proceedings [i.e., the illegal search and seizure] would be to affirm by judicial decision a manifest if not open defiance of the prohibitions of the Constitution, intended for the protection of the people against such unauthorized action". Nowhere in this historic decision is there any intimation that the Constitution would allow the admission of the evidence which the Court there outlawed; or that the Court was itself creating the prohibition.

In writing the opinion of this Court in *Wolf v. Colo-*

rado, 338 U. S. 25, Mr. Justice Frankfurter certainly construed the holding of the *Weeks* case as going beyond a judicially created rule of evidence, and as being a constitutional prohibition. At page 28 the following was said:

> In *Weeks v. United States*, *supra*, this Court held that in a federal prosecution *the Fourth Amendment barred the use* of evidence secured through an illegal search and seizure. This ruling was made for the first time in 1914. It was not derived from the explicit requirements of the Fourth Amendment; it was not based on legislation expressing Congressional policy in the enforcement of the Constitution. The decision was a matter of judicial *implication*. Since then it has been frequently applied and we stoutly adhere to it. (Emphasis added.)

In the same opinion, it was also said, at page 33, that "we have interpreted the Fourth Amendment to forbid the admission of such evidence". The dissenting members of the Court in *Wolf v. Colorado*, *supra*, emphatically agreed that the outlawry of such evidence is constitutional in origin.[1]

In commenting upon the consequences of permitting an indirect use of illegally seized evidence, Mr. Justice Holmes was equally forceful in *Silverthorne Lumber Company v. United States*, 251 U. S. 385. It would, he held,

[1]Mr. Justice Douglas said (p. 40): "I agree with MR. JUSTICE MURPHY that evidence obtained in violation of it [the Fourth Amendment] **must** be excluded in state prosecutions as well as in federal prosecutions, since in absence of that rule of evidence the Amendment would have no effective sanction". Mr. Justice Murphy, joined by Mr. Justice Rutledge, declared (p. 41): "For there is but one alternative to the rule of exclusion. That is no sanction at all", and (p. 44) "The conclusion is inescapable that but one remedy exists to deter violations of the search and seizure clause. That is the rule which excludes illegally obtaining evidence". Mr. Justice Rutledge expressed the same opinion in these words (p. 48): "The view that the Fourth Amendment itself forbids the introduction of evidence illegally obtained in federal prosecutions is one of long standing and firmly established".

reduce "the Fourth Amendment to a form of words". *Silverthorne Lumber Company v. United States, supra*, p. 392.

Construing the ruling of *Gouled v. United States*,[2] 255 U. S. 298, this Court declared in *Olmstead v. United States*, 277 U. S. 438, with respect to a paper stealthily extracted from the defendant's office by a federal agent, that "admission of the paper was considered a violation of the Fourth Amendment".

The clear implication of the Court's language in the quoted cases is that the right without the remedy is worthless.[3] The remedy must therefore be an inherent part of the constitutional privilege against an illegal federal search and seizure.

The rationale of the exclusionary rule is simple: to permit the evidentiary use of evidence illegally secured by the Federal Government will encourage federal agents to violate the Fourth Amendment, and, at the same time, place the victim for all practical purposes in the same position as if the Fourth Amendment did not exist. Conversely, to deny the evidentiary use of such evidence will,

[2] In answering the contention of the Government in **Gouled v. United States**, supra, that a court ought not to stop during a trial to inquire into the means by which evidence was obtained, this Court said (at p. 313): "A rule of practice must not be allowed for any technical reason to prevail over a **constitutional right.**" (Emphasis added.)

[3] This view finds expression in many state cases on the subject. See, for example, **State v. Sheridan**, 121 Iowa 164, 168, 96 N. W. 730, 731 ("To so hold is to emasculate the constitutional guaranty, and deprive it of all beneficial force and effect in preventing unreasonable searches and seizures"); **Youman v. Commonwealth**, 189 Ky. 152, 166, 224 S.W. 860, 866 ("It is much better that a guilty individual should escape punishment than that a court of justice should put aside a vital fundamental principle of the law in order to secure his conviction. * * * it is better for the public good that this should happen than that a great constitutional mandate should be nullified".) **Tucker v. State**, 128 Miss. 211, 223, 90 So. 845, 848. ("But we decline to follow those cases. In our judgment they in a large measure strike down the liberties intended to be secured by the constitutional guaranties—their view we think is too narrow".)

discourage federal agents from violating the Fourth Amendment because nothing can be accomplished thereby, and it will leave the victim no worse off than if the wrong had not be perpetrated. So viewed, the traditional remedy is as broad as the constitutional right, for it restores the *status quo* prevailing before the search and seizure and thereby deters federal agents from attempting to distrib this *status quo*.

The decision of the lower court would narrowly circumscribe this remedy and, to that extent, impair the constitutional right itself. In effect, federal agents would be told that the sole place that evidence illegally seized may not be used is in a federal criminal trial. Thus, there is a direct incentive on the part of federal agents to treat with indifference, if not to outright hostility, rights under the Fourth Amendment, secure in the knowledge that, if the evidence cannot be admitted in a federal prosecution, then it can be received in a state trial. Thi is a new, and heretofore unheard of, bonus for lawlessness by federal law enforcement officers.

The incentive to federal agents to invade the constitutional right in question, with the consequent peril to such right, is neither fanciful nor insubstantial. This very real danger springs from the existence of a vast area where federal and state p nal laws overlap, and where law enforcement officers of both closely cooperate. Thus, evidence establishing the following federal offenses would tend to establish a state crime as well: assault on a federal officer, embezzlement of property of bankrupt estate, uttering counterfeit, filing false election expenditures, theft from an F.D.I.C. bank, extortion, blackmail, flight to avoid prosecution, gambling without federal stamp, murder of federal officer, kidnaping, liquor violations, narcotic violations, transportation of lottery tickets, mail fraud,

prostitution near a military establishment, mailing obscene matter, transportation of dentures, income tax evasion, racketeering, wrecking trains, White Slave traffic, interstate transportation of stolen property, receipt of stolen goods, and National Bank robbery. These are but a few in the catalog of offenses where jurisdictions overlap.

From the viewpoint of the potential victim, he would be in constant jeopardy of an invasion of his home, and, thereafter, of a state prosecution made possible solely through the instrumentality of the federal authorities. Thus, there would be no restoration of his *status quo*. So far as the victim is concerned, who is thus brought to face a state prosecution, the protection of the Fourth Amendment against invasion of his home by the *Federal Government* "is of no value", and it "might as well be stricken from the Constitution." *Weeks v. U. S. supra*, 393.

In short, the only effective method of enforcing the constitutional guaranty against the Executive Branch of the Federal Government is to remove *all* incentive to invade constitutional rights, not a portion only. If the right against illegal search and seizure by federal authority is entitled to protection by a rule of exclusion, it is entitled to 100% protection. There is no basis in reason or in the Constitution for applying half a remedy, that is, discouraging illegal federal searches and seizures by suppressing the evidence in a federal court and encouraging such activity by admitting the same evidence in a state court, when the Constitution is the supreme law of the land in both tribunals. Art. VI, Constitution.

Considered in a different light, the issue is whether the protection against illegal search and seizure is available only when, and to the extent that, the evidence is sought to be employed to incriminate the victim in a federal pros-

cution, contrary to the Fifth Amendment. It is, of course, true that for the Federal Government to employ such evidence in a federal court would violate the Fifth Amendment.[1] It hardly follows, however, that the evidence may be used for every purpose except to violate the Fifth Amendment. This would strip the Fourth Amendment of any independent vitality. The person and home of every person would be subject to the ravages of federal power without limit, save only that the fruits of the seizure could not be made the basis of federal prosecution. Petitioner submits that such a qualification of the Fourth Amendment is without precedent, that the sweep of the Fourth Amendment is broader than the Fifth, and that it casts its enveloping shadow over *every* use whatsoever, whether in federal court or not, of evidence secured in defiance of the Fourth Amendment.

The case of *Go-Bart Importing Company v. United States*, 282 U. S. 344, illustrates the principle that the remedies afforded by the Fourth Amendment in the form of return and suppression are independent of the Fifth Amendment. One of the petitioners there was a corporation, and, as a corporation, possessed no right to invoke a claim against self-incrimination under the Fifth Amendment. *Hale v. Henkel*, 201 U. S. 43, 75; *Baltimore & Ohio R.R. v. Int. Com. Comm.*, 221 U. S. 612, 622. The corporate petitioner was not named in any criminal proceeding. This Court nevertheless remanded the case to the District

[1] **See Gouled v. United States**, 255 U. S. 298, in which it was said (at p. 311):

> The fourth question reads: "If such papers so taken are admitted in evidence against the person from whose house or office they were taken, such person being then on trial for the crime of which he was accused in the affidavit for warrant,—is such admission in evidence a violation of the Fifth Amendment?".
>
> The same papers being involved, the answer to this question must be in the affirmative for, they having been seized in an unconstitutional search, to permit them to be used in evidence would be in effect, as ruled in the **Boyd Case**, to compel the defendant to become a witness against himself.

Court with direction "to enjoin the United States attorney and the special agent in charge from using the papers as evidence and to order the same returned to the petitioners".

The ruling in *Silverthorne Lumber Company v. United States, supra*, rests squarely on the Fourth Amendment, and is completely divorced from self-incrimination. There also the corporate defendant could not have relied upon a claim of incrimination. Nevertheless, this Court, speaking through Mr. Justice Holmes, condemned *any* use of the evidence in these words (p. 392):

> The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court *but* that *it shall not be used at all.* (Emphasis added.)

Thus the availability of the remedies of suppression and return to a corporation demonstrates that the Fourth Amendment is not a mere handmaiden of the Fifth, that its protection is not defined in terms of incrimination in a federal court.

Additional proof of this point may be found in the fact that the exclusionary rule applies to civil cases. *Rogers v. United States*, 97 F. 2d 691 (C.A. 1st); *United States v. Physic*, 175 F. 2d 338 (C.A. 2d). Again, if the redress of return and suppression were dependent in some way upon the intended use by the United States of the evidence for incrimination, and if it were simply a means of forestalling such a use in advance of prosecution, then logically the return and suppression ought to be granted only upon a showing of intended prosecution. Yet, this is not true: property will be returned before prosecution is commenced. *Steele v. United States*, No. 1, 267 U. S. 498; *Go-Bart Company v. United States, supra*; *Burdeau*

v. McDowell, 256 U. S. 465; *Perlman v. United States*, 247 U. S. 7, when no prosecution is pending before the court asked to return the evidence, and when such court *could not* therefore be ruling on the admissibility of evidence, to be offered before it in trial, *Weinberg v. United States*, 126 F. 2d 1004 (C.A. 2d), and after the prosecution has terminated, *Dickhart v. United States*, 57 App. D. C. 5, 16 F. 2d 345.

That the fruit of an illegal seizure might be frozen in the hands of the offending government for all purposes, and not merely a pending prosecution, seems to be conceded in *United States v. Wallace & Tiernan Company*, 336 U. S. 793, 822. The issue there was not whether an "order of general outlawry" as to such evidence could be validly be issued, and whether "the scope of relief in such a case [suppression] may extend far beyond its effect on a pending trial". Rather, granting that a suppression *could* have this effect, this Court was concerned entirely with whether the particular order *did* have such an effect.

If, as appears from the foregoing cases,[3] the Fourth Amendment is in no way qualified by the Fifth Amendment prohibition against using evidence in federal court for incriminating purposes, then no reason exists for limiting the protection of the Fourth Amendment to the

[3]See **District of Colombia v. Little**, 85 U. S. App. D. C. 242, 245, 178 F. 2d 13, 16, affirmed (on other grounds) 339 U. S. 1, in which such a qualification upon the Fourth Amendment was urged by the Government, and rejected by the Court in these words (at p. 245-246):

> The argument is wholly without merit, preposterous in fact. The basic premise of the prohibition against searches was not protection against self-incrimination; it was the common-law right of a man to privacy in his home, a right which is one of the indispensable ultimate essentials of our concept of civilization. * * *
>
> ***To view the amendment as a limitation upon an otherwise unlimited right of search is to invert completely the true posture of rights and the limitations thereon.

use by the Federal Government of the evidence in its own courts.

B. *The Constitutional Prohibition on the Admission of Evidence Illegally Seized by the Federal Government is Applicable to State Courts.*

If, then, evidence illegally seized by the United States is infected with a constitutional taint, is a state court as well as a federal court obliged to ban its admission? Of necessity, the answer must depend upon what law is paramount in a state court in admitting or excluding evidence. Petitioner submits that the Constitution, being equally the supreme law of the land in state courts and federal courts, demands that state courts exclude evidence admittedly obtained by a violation of the Constitution. See Art. VI, Constitution.

In *State v. Rebasti*, 306 Mo. 336, 267 S. W. 858, the Supreme Court of Missouri considered the admissibility in state courts of evidence illegally seized by federal officers. The latter had obtained a search warrant on the grounds that the affiant believed the safe deposit box in question was being "rented, used and controlled by Charles Rebasti for the unlawful sale and concealment of narcotic drugs". Admittedly the warrant issued by the United States Commissioner was invalid. In the presence of the bank's vice-president, the federal agents opened the box and discovered currency traceable to a robbery. At the trial for robbery the vice-president testified as to the presence of the money in defendant's safe deposit box, despite defendant's previous motion to suppress before trial.

On appeal from conviction, it was held that the motion was properly denied so far as the Missouri Constitution was involved, since the Missouri Constitution did not con-

rol the activity of federal officers, but only state officers. Referring to the claimed violation of the Federal Constitution, however, the Court said (pp. 346, 347):

> A different question is presented when we consider the claim that the production of evidence obtained was in violation of the defendant's rights under the Federal Constitution. State courts are as much under obligation to protect the rights of defendant guaranteed him by the United States Constitution as those guaranteed him by the Constitution of the State, . . .
>
> It is contended that because this case arises in a state court, and not in a federal court, this court cannot take notice of the restriction of the Fourth and Fifth Amendments to the Federal Constitution.
>
> It is unthinkable that a state court is powerless to protect the constitutional rights of its citizens, guaranteed by the Federal Constitution. To hold the evidence of the federal agents admissible in this case is to pronounce that doctrine. It is to say that the act of an officer, or of any other individual, is lawful or unlawful, not on account of the character of the act, but on account of the court in which it is called in question.

The opinion in the *Rebasti* case, *supra*, also disposes of the respondent's inference that, since the rule of suppression in federal courts does not apply to evidence wrongfully seized by state officers without federal participation, so evidence need not be excluded in state courts where illegally taken by federal agents without state participation.* At page 347 of *State v. Rebasti*, *supra*, the

*This reasoning appears in the respondent's Brief in Opposition to Petition for Certiorari (pp. 6-7), where dictum in **Byars v. United States**, 273 U. S. 28 is cited.

basis appears for allowing state officers to testify in federal courts on matters discovered by them in an illegal search:

> The restrictions of the Fourth and Fifth Amendments to the Federal Constitution apply only to federal officers. The like restrictions in a State Constitution apply only to state officers. When a case arises in a federal court and a state officer, as a witness, is asked to give evidence discovered by him in an unreasonable search and the provisions of the Federal Constitution are invoked in objection to his testimony, the court always holds that he may testify because the restrictions of the Federal Constitution do not apply to him.
>
> Likewise, in a state court, when a federal official is offered as a witness and is asked to testify to some facts which he discovered by an unreasonable search, and the State Constitution is cited in objection, his evidence is held competent because the restrictions of the State Constitution do not apply to him. But when a federal officer is offered as a witness in a state court, and his evidence is objected to because discovered in violation of the Federal Constitution, no case is cited where it is held admissible.
>
> Such constitutional restrictions of federal officers and state officers always apply wherever they are called in question.
>
> Suppose a federal officer should make an unreasonable search, and in doing so outrage the citizen's rights under the United States Constitution. Can it be said that the unlawful act of the officer could become lawful because of the court in which it is questioned? Suppose the injured citizen should sue him in the state courts for damage done in violation of

his constitutional rights, and the officer in defense should plead that, although he acted unlawfully, the plaintiff had no right to prove it in a state court. Does anyone suppose the plea would be good?

In this case, the federal officer violated the constitutional rights of the defendant, and violated the constitutional restrictions upon his own behavior as a federal officer. Had the case been pending in the federal court he could not have testified, because his act in procuring his information was *unlawful*. His case, however, is pending in the state court and it is contended that he may testify because his act was *lawful*. By that theory, his act becomes lawful or unlawful, not because of its quality, but because of the court which decides the question. He can bring his misdemeanor to a state court and there have his lawless disregard of his official duty appraised as a meritorious performance.

Numerous cases are cited in support of the opposite view, where it is said that the amendments to the Federal Constitution are intended to limit the power of the *national government* alone and do not affect the powers of the *state governments*. This is construed by the prosecution to mean that the restrictions of the national government do not affect state courts. But the cases cited do not so hold. Where the opinions in such cases hold that the Fourth and Fifth Amendments to the Federal Constitution operate upon the federal government only and not upon the state government, they mean, of course, the agents of the federal government. If those amendments are intended to restrain the actions of federal officers, why should it ever be held that under certain conditions they do not restrain them?

The case of *People v. Adams*, 176 N. Y. 351 68 N. E. 636, is cited, where it is said that the Fourth and Fifth Amendments to the Constitution of the United States do not apply to *actions in the state courts*. That statement is purely *obiter*. The facts in the case do not warrant any such statement of the law. In no case has it ever been held, so far as I can discover, that the unlawful act of a federal officer becomes lawful when brought into question in a state court, or that the evidence of a federal official, which would be held incompetent in a federal court on account of the restrictions of the Fourth and Fifth Amendments, becomes competent when offered in a state court.

Thus, a federal court might receive evidence illegally seized by state officers without federal participation simply because there has been no violation of the Fourth Amendment. See *Byars v. United States*, 273 U. S. 28, 33. A state constitutional provision is not the supreme law of the land for a federal court. But the converse is not true. When there is offered in a state court evidence illegally seized by federal agents, even though the state constitution has not been violated, the federal constitution has. And the federal constitution is entitled to the same recognition in the state court as in the federal. "Upon the state courts, equally with the courts of the Union, rests the obligation to guard and enforce every right secured by that Constitution." *Mooney v. Holohan*, 294 U. S. 103, 113; *Robb v. Connolly*, 111 U.S. 624.

There can be no doubt that the federal constitution is adequate to reach and suppress evidence in a state court. If, in order to obtain information, Congress must cloak with immunity evidence given before a congressional committee, there exists the requisite constitutional power

to do so. *Adams v. Maryland*, 347 U. S. 179; *Brown v. Walker*, 161 U. S. 591, 606. *A pari*, if the guarantees of the Fourth Amendment demand a suppression of evidence in order to protect one's home from federal invasion, the Constitution can affect state as well as federal proceedings.

State v. Arregui, 44 Idaho 43, 254 Pac. 788, involving a suppression of evidence secured by a federal prohibition officer pursuant to a warrant issued by the United States Commission on hearsay evidence. There the Court said (at p. 67):

> In the hands of the state courts is placed the power to prevent in part the violation of the rights of a citizen by federal authorities in violation of state and federal constitutions. This is not only in the power of the state court, but its duty. If, as said in the Burdeau case, the Fourth Amendment to the federal constitution "was intended as a restraint upon the activities of sovereign authority, * * * governmental agencies," and in the Byars case, "the assurance against any revival of" the "misuse of power in the matter of searches and seizures," embodied in the Fourth Amendment, "is not to be impaired by judicial sanction of equivocal methods * * * which, in reality, strike at the substance of the constitutional right," and as the same intention prompted the adoption of the provisions of our state constitution "to secure the people against unauthorized official action," there seems no other logical conclusion than that unauthorized official action should not receive judicial sanction by receipt of evidence in a state court, although secured by Federal officers, which, upon the same showing of facts, would be denied in a federal court, when to do so would be to violate the same

right guaranteed by both the federal and state constitutions.

See also *State v. Hiteshaw*, 42 Wyo. 147, 153-154, 292 Pac. 2; *Walters v. Commonwealth* 199 Ky. 182, 250 S. W. 839; *Little v. State*, 171 Miss. 818, 159 So. 103. *Contra*: *State v. Gardner*, 77 Mont. 8, 249 Pac. 574; *Terrano v. State*, 59 Nev. 247, 91 P. 2d 67; *Comm. of Pa. v. Colpo*, 98 Pa. Superior Court 460, certiorari denied, 282 U. S. 863. The opposing authorities cited do not consider the distinction between a federal court's not being bound by state law and a state court's being obliged to recognize federal constitutional rights as paramount over any state rights in conflict therewith. To that extent such authorities are of little value.

While respondent finds comfort for its position in *Wolf v. Colorado*, 338 U. S. 25, 33, the fact is that the Wolf case is exclusively concerned with what remedies the Fourteenth Amendment demands of the states in dealing with illegal searches by state officers: its holding does not touch on the problem of what the Fourth Amendment requires as an effective means of protecting one against an invasion of his home by federal officers. The opinion in the *Wolf* case takes pains to distinguish between the deterrents that exist against state officials and federal officials, with the consequent need for the stronger remedy, namely, suppression, where federal officers are concerned.[7] Thus, the effect of the Wolf case is to leave unimpaired the traditional remedy of suppression in Fourth Amendment cases.

[7] "The public opinion of a community can far more effectively be exerted against oppressive conduct on the part of police directly responsobile to the community itself than local opinion, sporadically aroused, be brought to bear upon remote authority pervasively exerted throughout the country." **Wolf v. Colorado, supra**, at pp. 32-33.

II

The District Court Was Obliged to Redress the Constitutional Wrong Done to the Petitioner by an Abuse of the Court's Own Process.

Reduced to its elements, this case involves a refusal of the District Court to undo a wrong initiated by an inferior officer of the Court in issuing an invalid warrant and continued by a federal agent's exerting judicial power in executing the invalid warrant. This is not a case where the Court is being asked to extend the arm of judicial power over a government agent acting independently of the Court. From start to finish, the wrong is a judicial wrong, which should be remedied by the Court in which it occurred.

The illegal warrant was process of the Court. In issuing the warrant, the United States Commissioner acted as "an inferior officer" of the District Court. *Go-Bart v. United States*, *supra*, 352; *United States v. Allred*, 155 U. S. 591, 594. The initial error was as much an error of the Court as if the district judge himself had authorized the warrant. Thus, the District Court had jurisdiction to quash the warrant, Rule 41 (e), Rules of Criminal Procedure, and nip the error in the bud. Undoubtedly it would have done so in advance of its execution if petitioner had had time to move to quash the warrant. Petitioner submits that he should be in no greater jeopardy merely because the federal officers were so diligent in executing the illegal process that petitioner could not get into federal court in time to quash the warrant. To so rule would make the protection of the Fourth Amendment the prize in a race of diligence between an intended victim of an invalid warrant and federal officers: only if the victim could get into court fast enough would he enjoy the full protection of the Fourth Amendment. This, of course,

would reward law enforcement officers for the speed with which they could execute illegal process.

Again, the warrant is returnable to the court and the property seized is placed by statute "*in custodia legis*, and subject only to the orders and decrees of the courts of the United States." 28 U.S.C. 1952 ed., Sec. 2463. Thus the disposition of the evidence remains entirely within the province of the court.

Even if there is no constitutional right on the part of the petitioner to have the evidence suppressed, the Court should have done so as an exercise of its inherent authority and duty to correct the abuse of its process.[8] In a similar situation in *Wise v. Henkel*, 220 U. S. 556, where the trial court had ordered the United States Attorney to return papers seized pursuant to the court's warrant, this Court held (at p. 558):

> * * * the authority of the Court to consider and decide the application for the return of the books and papers existed wholly irrespective of whether there was a constitutional right to exact the return of the books and papers. That is to say, it was within the power of the Court to take jurisdiction of the subject of the return, and pass upon it, as the result of its *inherent authority to consider and decide questions arising before it concerning an alleged unreasonable*

[8] See **United States v. Specified Quantities of Intoxicating Liquors**, 7 F. 2d 835 (C.A. 2d), where liquor seized under an illegal warrant was ordered returned (p. 836):

> It is enough to hold as we do, that, either at law or in admiralty, the validity of an attachment or propriety of a seizure in rem can always be raised by a motion to vacate. The practice is elementary. Therefore it was proper to move to vacate this seizure. Ordinarily a sheriff or United States Marshal does not require to be specially told to whom he shall restore possession of what he improperly seized, but, as the marshall had received the goods from the prohibition agents, it was well to tell him where they should go, for the authority of the agents to have the goods at all had been destroyed by the violation of search warrant by the United States Commissioner.

exertion of the process of the Court. (Emphasis added).

For the trial court to quash the warrant, but allow those who executed it to make use of what was obtained through its use, would be to sanction and encourage the abuse of its judicial process. To argue, as the respondent does, that New Mexico might constitutionally convict the petitioner if it obtained this evidence, is no answer. A court ought to remedy an abuse of its process without respect to the fact that, by failing to do so, it could enable the State of New Mexico directly to profit from the abuse. Thus, the admissibility or non-admissibility of the evidence in a state court, does not diminish one whit the inherent obligation of a federal court to correct the abuse of its process.

Respondent seems to argue that, simply because the State of New Mexico could use the evidence to obtain a conviction (relying on *Wolf v. Colorado, supra*), the federal district court has no obligation to retain the evidence. This is a *non sequitur*. It might well be that the United States has an obligation under the Constitution to return and suppress evidence which, if a state by some means, legal or not, could get hold of, it might use for a conviction.

In *Boske v. Comingore*, 177 U. S. 459, for example, the Collector of Internal Revenue had an obligation, immediately imposed by regulation and ultimately by the Constitution, not to make certain records available to a Kentucky court for the use of the State of Kentucky as plaintiff. It might well be that, had Kentucky somehow obtained the records, the proceedings in the Kentucky court would not be invalid. Nevertheless, the Collector who threatened to surrender possession of the records would be restrained by a federal court from doing so. In

short, an obligation on the part of the federal agent to retain certain evidence, physical and otherwise, is in no way impaired by the ability of a state court to use the evidence if it could obtain it. See also *United States ex rel. Touhy v. Ragen*, 340 U. S. 462.

To the extent that petitioner is attempting to enforce against the Federal Government an obligation not to transfer evidence, it is necessary that he invoke the power of the district court. By waiting to be convicted in a state court, the matter would be rendered moot since the federal agent would already have acted and thus rendered the matter moot. Futhermore, barring exceptional circumstances, resort to federal court may be had without first exhausting the judicial remedies of state court. *Lane v. Wilson*, 307 U. S. 268, 274.

III

The Threatened Action of United States Agents to Supply the Means of Conviction in a State Court Should be Restrained as in Excess of the Constitutional Powers of the Government.

The United States is a government of delegated powers, and those powers not granted expressly or by reasonably implication, are "prohibited". *United States v. Butler*, 297 U. S. 1. Where in the Constitution is the Federal Government given the authority to ferret out and supply evidence solely for the benefit of state prosecutions? That, in effect, is what the Government is in the process of doing, there being no question of prosecution now under federal law.

If the United States used the evidence in its own courts, it would be compelling a defendant to become a witness against himself, in violation of the Fifth Amendment. *Gouled v. United States*, 255 U. S. 2[illegible], 311. If it

is the instrumentality of supplying the evidence for a state prosecution, it is compelling the defendant to incriminate himself but before a different forum. Regardless of the forum before which the incrimination is compelled, the nature of the activity is the same—compulsory self-incrimination by the United States.

Parenthetically, it should be noted that the evidence in question is *in custodia legis* and available to a state court only by order of the district court. 28 U.S.C. 1952 ed., Sec. 2463. The intervention of the district court by decree to supply the incriminating evidence to the state, would constitute action by the United States itself. *See Shelley v. Kraemer*, 334 U. S. 1.

Here, too, a federal officer initiated the prosecution and is the essential witness. Thus, the active participation of the Federal Government is an essentail ingredient of the state prosecution.

Petitioner submits that this compulsory self-incrimination by the National Government is prohibited because it constitutes an activity not within the enumerated powers of the Federal Government. In order to reduce the problem to its simplest terms, let us suppose that Congress would enact a statute providing that the Executive Department might compel evidence of crime from suspects, and supply the evidence thus obtained to state courts. The statute would further proyide absolute immunity from federal prosecution on account of any evidence thus brought to light. Possibly under *United States v. Murdock*, 284 U. S. 141, 149, such a law would not offend the Fifth Amendment "in that full and complete immunity against prosecution by the Government compelling the witness to answer is equivalent to the protection furnished by the rule against self-incrimination". Nevertheless, though compulsory self-incrimination in state courts

is not specifically forbidden to the central government, it is not expressly or impliedly granted either. Such a statute would certainly not be sanctioned by this Court.

A distinction must be made between a legitimate federal activity which has the incidental effect of incriminating one under state law, and federal activity that has the sole and only purpose of compulsory incrimination under state law. If the Government is engaged in a legitimate pursuit, such as tax collecting, it cannot be restricted by what another soverign might choose to do. See *Feldman v. United States*, 322 U. S. 487, 491. In such case, the validity of its action is justified by the fact it is performing a function entrusted to it by the Constitution.

This Court in *United States v. Murdock, supra*, was careful to make this distinction (p. 149):

> The plea [of Self-incrimination] does not rest upon any claim that the inquiries were being made to discover evidence of crime against state law. Nothing of state concern was involved. The investigation was under federal law in respect of federal matters. The information sought was appropriate to enable the Bureau to ascertain whether appellee had in fact made deductible payments in each year as stated in his return, and also to determine the tax liability of the recipients. Investigations for federal purposes may not be prevented by matters depending upon state law. Constitution Art. VI, § 2.

In *Irvine v. California*, 347 U.S. 128, the use by a state court of a report of the petitioner's gambling activity made by him in purchasing a federal wagering stamp was upheld as not violating the Fifth Amendment. The justification was that the Federal Government was engaged in collecting a federal tax, the incrimination under state law.

being incidental. It could hardly be supposed that a federal law simply requiring all gamblers to make a report so that it could be turned over to the state, (without paying any tax and therefore not a revenue measure) would be upheld.

Save for the fact that the Congress has not by law authorized what the federal court, and federal agents, are about to do in the instant case, the circumstances are identical: the inferior officer of the district court, the United States Commissioner, in issuing the warrant, and the federal agent in executing it, were acting contrary to the Constitution. What they did can no more be justified than could a statute requiring all gamblers to file a report of the activities with the federal authorities (*without the payment of any tax.*) Hence, the subsequent incrimination through the use of federal powers is not incidental to the exercise of any constitutional power, but rather it is incidental to the exercise of an *unconstitutional* power. It should, therefore, be held that the activity of the Federal Government, through its judicial and executive branch, in incriminating a person under state law, is not a delegated constitutional power.

IV

If Any Conflict Exists Between a State Right to Obtain Evidence and an Individual Constitutional Right to Suppression, the Federal Right Must Prevail.

In the opinion of petitioner, the Court of Appeals misconstrued *Stefanelli v. Minard*, 342 U.S. 117, as controlling the disposition of the case at bar. The *Stefanelli* case held that a federal court, in the exercise of discretion, should refuse to enjoin state officials from using evidence, claimed to be unlawfully seized by the state, in a criminal trial.

The requested relief would have been an "active intrusion" into the state proceedings because the restraining hand of federal power would have been laid directly on state officials. At the policy level, it was said that the result of sanctioning such intervention would have been to "expose every state criminal prosecution to insupportable disruption."

Different considerations govern this case. Federal power is exerted solely on agents of the United States acting as such, not on state officials. The evidence in question is already in the custody of federal law and officials. The redress sought will not cause the federal judiciary to interfere with state officials, or with their use of evidence, but will simply preserve the *status quo*. If any interference could arise, of necesity it would be caused by an attempt of the state to seize control of what is in federal custody. For the state court to be unable to secure evidence under control of the Federal Government is no more an interference with the state prosecution than would be the refusal of the Federal Bureau of Investigation to produce confidential reports in answer to a subpoena *duces tecum* or the refusal of an F.B.I. agent to testify as to the contents of such a report, or as to the identity of an informant. See *United States ex rel. Touhy, v. Ragen, supra.*

When a state is denied the use of relevant evidence because it has been suppressed in federal court, this is no more of an interference with the state than when a federal court orders the property returned to the victim (no contraband being involved). In either case, it is unavailable for a state prosecution. If suppression alone constitutes interference with the state, so does a return, the sole distinction being that the victim does not ask for the evidence to be restored.

From what has been said, it follows either that a state

has no right to obtain evidence that the aggrieved person seeks to have returned or suppressed, or that the state could prevent a return by intervening. The later alternative means that the constitutional remedy of return and suppression is limited to those situations where a state government does not want to use the evidence in question. That a state government, rather than the victim, has a priority with respect to the use, or lack of use, and the possession of, illegally seized property, is patently absurd.

The distinction between the case at bar and *Stefanelli v. Minard*, *supra*, become apparent from those cases holding that, once a court of the United States acquires control of a *res*, it is beyond the reach of a state court. See *Covell v. Heyman*, 111 U.S. 176, in which property held by a United States Marshal under federal execution was declared to be beyond the reach of the state court. This Court there said (at p. 179):

> The point of the decision in *Freeman v. Howe*, *supra*, [24 How. 450,] is that, when property is taken and held under process, mesne or final, of a court of the United States, it is in the custody of the law, and within the exclusive jurisdiction of the court from which the process has issued, for the purposes of the writ; that the possession of the officer cannot be disturbed by process from any state court, because to disturb that possession would be to invade the jurisdiction, of the court by whose command it is held, and to violate the law which that jurisdiction is appointed to administer; * * *

That the evidence in question is here in the custody of federal law, subject to orders of the district court, should dispose of the position of the Court of Appeals that the *Stefanelli* case "has force and applicability here".

V

There is no Warrant for Limiting the Previous Order of the Trial Court and the Language of Rule 41 of the Federal Criminal Rules to a Restriction on Using the Evidence in Federal District Court Alone.

The appelant had moved that the property seized "be suppressed as evidence against him *in any criminal proceeding* including the above entitled action". (R.3) The trial court granted the motion in the form in which made (R.4), and the Government moved to dismiss. (R. 4-5) At this point, unless the order suppressing the evidence were appealed by the United States, it became final. See *United States v. Cefaratti*, 91 U.S. App. D.C. 297, 302 F.Hd 13 certorari denied, 345 U.S. 997. As the United States did not appeal, the order granting the motion *in the terms in which it was made*, became *res judicata*, even if it *erroneously* prohibited the use of the evidence in a state criminal proceeding. See *Steel v. United States*,* No. 2, 267 U.S. 505, 507. The subsequent order of the trial court, to the extent that it was in conflict with the first order, is invalid.

The terms of the motion that was granted clearly contemplate a suppression in criminal proceedings other than, and in addition to, the narcotics case then pending, since the phrase employed is "including the above-entitled action". Had the petitioner intended to restrict the effect, he obviously would have said in plain English, "be suppressed as evidence against him in any criminal proceeding *in this court*, including the above entitled action." It is submitted that "*any* criminal proceeding" is sufficiently broad in scope to embrace a criminal action in any of the forty-eight states, or any federal court, or any military tribunal.

*"The refusal to vacate the search warrant and to return the liquor seized was a final decree. The question is therefore *res judicata* as against him." **Steel v. United States No. 2, supra**, at p. 507.

Rule 41 (e) is equally comprehensive. It prohibits the use of the evidence "at any hearing or trial". While the meaning of this rule has not been judicially interpeted, this Court construed a similar phrase in a recent term of court. In *Adams v. Maryland*, 347 U.S. 179, the Supreme Court was called upon to decide whether a witness testifying before a congressional committee could have the evidence there given used by the State of Maryland in a criminal prosecution. Title 18, U.S.C. 3486, provided that no testimony given before a congressional committee "shall be used as evidence in any criminal proceeding against him in any court." There, as here, it was urged that "any criminal proceeding" and "any court" really meant only a *federal* court prosecution. This Court rejected the argument in these words:

> Nor can we hold that the Act bars use of committee testimony in United States courts but not in state courts. The Act forbids use of such evidence "in any criminal proceeding . . . in any court." Language could be no plainer. Even if there could be legislative history sufficiently strong to make "any court" mean United States courts only, there is no such history.

Mr. Justice Jackson, in his concurring opinion, was equally emphatic:

> The statute seems as unambiguous as language can be. If words mean anything, the statute extends its protection to all witnesses, to all testimony, and in all courts.

The fact that the Federal Rules of Criminal Proceedure "govern the proceedure in the courts of the United States * * * in all criminal proceedings", Rule 1, Federal Rules of Criminal Proceedure, does not *of itself* mean that the suppression is effective *only* in a federal criminal pro-

ceeding. Rule 41 (e) certainly has no requirement that a criminal proceeding be pending or contemplated. It is enough that the person have been aggrieved by an unlawful search and seizure in the district where the motion is brought. The note to subdivision (2) of the rule shows that the rule is a restatement of existing law and practice, with the exception of eliminating hearings before United States Commissioners. Existing practice permitted motions to return and suppress apart from a criminal proceeding. *Go-Bart Co. v. United States, supra*, 282 U.S. 344; *Burdeau v. McDowell, supra*. In *United States v. Wallace Co., supra*, it was conceeded that an order of suppression *could* extend beyond a criminal trial, and bar use of the evidence civilly. Therefore, Rule 1 does not restrict the scope of a suppression under Rule 41 (e) to a federal criminal proceeding.

CONCLUSION

The judgement of the Court of Appeals is in error and should be reversed and in the case remanded with directions to grant the motion of the petitioner.

Respectfully submitted,

Thomas F. McKenna
Joseph A. Sommer
302 East Palace Avenue
Santa Fe, New Mexico

Counsel for Petitioner.

LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U.S.
FILED
FEB 18 1955
HAROLD B. WILLEY, Clerk

No. ~~555~~ 30

In the Supreme Court of the United States

OCTOBER TERM, 1954

DANTAN GEORGE REA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

SIMON E. SOBELOFF,
Solicitor General,
WARREN OLNEY III,
Assistant Attorney General,
GRAY THORON,
Special Assistant to the Attorney General,
BEATRICE ROSENBERG,
FELICIA DUBROVSKY,
Attorneys,
Department of Justice,
Washington 25, D. C.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Rules involved	2
Statement	3
Argument	5
Conclusion	10

CITATIONS

Cases:	
Byars v. *United States*, 273 U. S. 28	6, 8
Gambino v. *United States*, 275 U. S. 310	8
Go-Bart Co. v. *United States*, 282 U. S. 344	7
Irvine v. *California*, 347 U. S. 128	6
Lustig v. *United States*, 338 U. S. 74	8
McNabb v. *United States*, 318 U. S. 332	8
Stefanelli v. *Minard*, 342 U. S. 117	5, 6
Walder v. *United States*, 347 U. S. 62	8
Weeks v. *United States*, 232 U. S. 383	8
Wolf v. *Colorado*, 338 U. S. 25	6, 7, 8
Statute:	
26 U. S. C. 2593 (a)	3
Miscellaneous:	
Federal Rules of Criminal Procedure:	
Rule 1	2
Rule 41 (e)	2, 8

332335—53

In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 555

DANTAN GEORGE REA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (R. 2–7, Pet. 15–20) [1] has not yet been reported. The opinion of the District Court is unreported (Tr. 7–8).

JURISDICTION

The judgment of the Court of Appeals was rendered on December 23, 1954 (R. 8). The petition for a writ of certiorari was filed on January

[1] The designation "R." refers to the record of proceedings in the Court of Appeals; the designation "Tr." refers to the printed Transcript of Record in the District Court.

19, 1953. The jurisdiction of this Court rests on 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether a federal court should enjoin a federal officer from testifying in a state criminal proceeding regarding evidence which he had seized under an invalid federal search warrant and which had been suppressed in the federal court as unlawfully seized.

2. Whether a federal court should enjoin federal officers from transferring possession of such suppressed evidence to state prosecuting officials.

RULES INVOLVED

The Federal Rules of Criminal Procedure provide, in pertinent part:

> Rule 1. Scope.
>
> These rules govern the procedure in the courts of the United States and before United States commissioners in all criminal proceedings, with the exceptions stated in Rule 54.

> Rule 41. Search and Seizure.
>
> * * * * *
>
> (e) *Motion for Return of Property and to Suppress Evidence.*
>
> A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for the use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant, or (2) the warrant is insufficient

on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or (5) the warrant was illegally executed. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. The motion to suppress evidence may also be made in the district where the trial is to be had. The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing.

STATEMENT

On September 12, 1953, an indictment charging the unlawful acquisition of marihuana in violation of 26 U. S. C. 2593 (a) was returned against petitioner in the United States District Court for New Mexico (Tr. 2). Petitioner subsequently moved to suppress as evidence marihuana and other property taken from his home by federal narcotics agent Salter, on the ground that the warrant on which the search was based was invalid [2] (Tr. 3–4). The motion sought to have the property "suppressed as evidence against him in

[2] Petitioner's motion alleged that (a) the warrant was insufficient on its face, (b) no probable cause existed, and (c) the affidavit was based on unsworn statements (Tr. 3–4).

any criminal proceeding"; including the proceeding in which the motion was filed (Tr. 3–4). On June 18, 1954, the District Court granted the motion to suppress, and, on the Government's motion, dismissed the indictment (Tr. 4–5).

Immediately thereafter, on the basis of a complaint filed by federal narcotics agent Salter, a warrant of arrest was issued against petitioner by a New Mexico court charging him with possession of marihuana in violation of state law (Tr. 6–7). Petitioner was thereupon arrested and held for trial in the state court on this charge.

Alleging that the evidence which had been suppressed in the federal court formed the basis of the state charge, petitioner, on June 21, 1954, sought in the United States District Court an order holding Salter in contempt for violation of the order of suppression and enjoining him and other agents of the United States from transferring the seized evidence to state authorities or testifying with respect thereto in the state courts (Tr. 5–7). The District Court denied the motion, holding that (Tr. 8):

> * * * suppression of evidence in a Federal Court, under Rule 41 of the Federal Rules of Criminal Procedure, and the Fourth Amendment to the Constitution of the United States, applies only to proceedings in a United States District Court,

[3] The motion did not seek the return of the marihuana. Since it was contraband, it was not returned.

and does not govern the use of that evidence in a State Court.

On appeal, the Court of Appeals affirmed the order (R. 8).

ARGUMENT

While the problem here presented is substantial and has not heretofore been directly determined by this Court, further review in this case is unnecessary because (1) the decision below is correct in the light of this Court's prior decisions; and (2) in any event petitioner will have ample opportunity in the state proceedings to test his federal question, but without the necessity of creating a needless clash between coordinate state and federal courts.

1. The holdings of this Court clearly limit the application of the rule relating to the suppression and exclusion of improperly seized evidence to the federal courts and also strictly enjoin lower federal courts from interfering with the conduct of state judicial proceedings. As the court below recognized (R. 7; Pet. 19), the net effect sought by petitioner's application is to have the federal courts control and limit the evidence which may be available to a state court for prosecution of a state crime. This Court has consistently refused to do so. As was recently stated in *Stefanelli* v. *Minard*, 342 U. S. 117, 120:

> We hold that the federal courts should refuse to intervene in State criminal proceedings to suppress the use of evidence

> even when claimed to have been secured by unlawful search and seizure. The maxim that equity will not enjoin a criminal prosecution summarizes centuries of weighty experience in Anglo-American law. It is impressively reinforced when not merely the relations between coordinate courts but between coordinate political authorities are in issue.

While the *Stefanelli* case involved a proceeding against state officials to prevent the use of evidence alleged to have been wrongfully seized by state officers, the circumstance that this case involves an attempt to control the use by the state of the testimony of a federal officer in no way lessens the controlling force of that decision. Petitioner, like Stefanelli, is attempting to have a federal court tell a coordinate state court what evidence it may or may not use.

This Court held in *Wolf* v. *Colorado*, 338 U. S. 25, 33, that "in a prosecution in a State court for a State crime the Fourteenth Amendment does not forbid the admission of evidence obtained by an unreasonable search and seizure"—a holding which was recently reaffirmed in *Irvine* v. *California*, 347 U. S. 128, 132–133. If a state may use evidence wrongfully seized by its own officers over whom it has control, there is no reason for it to be barred from using evidence seized by officers over whom it has no control. Cf. the dictum in *Byars* v. *United States*, 273 U. S. 28, 33, to the effect that the rule of suppression in

federal courts does not apply to evidence wrongfully seized by state officers without federal participation.

Petitioner admits that if the premise is granted that the rule of suppression is "only a rule of evidence applicable to Federal criminal trials, imposed as a matter of Federal judicial policy," the conclusion reached by the court below might follow (Pet. 9–10). As Justice Black said in his concurring opinion in the *Wolf* case, 338 U. S. at p. 39–40, the "plain implication of the Court's opinion" in that case is just that premise, that "the federal exclusionary rule is not a command of the Fourth Amendment but is a judicially created rule of evidence which Congress might negate". Petitioner seems to think (Pet. 11) that the interpretation of the exclusionary rule as a rule of evidence is negated by such cases as *Go-Bart Co.* v. *United States*, 282 U. S. 344, holding that property wrongfully seized, which is not contraband, should be returned. However, an order for return is not necessarily an order for suppression, except to the extent that the Fifth Amendment might bar compulsory production of such property at the trial. Certainly an order to return would not in and of itself bar the use of oral testimony as to what was observed.[4]

[4] For the same reason there is no force in petitioner's argument that, if the property seized had not been contraband, it would not have been available to the state. Oral testimony would still have been available to the state.

The use of improperly obtained evidence is barred in the federal courts under the rule of suppression which is presently found in Rule 41 of the Federal Rules of Criminal Procedure. This rule was developed by this Court in cases like *Weeks* v. *United States*, 232 U. S. 383; *Byars* v. *United States*, 273 U. S. 28; *Gambino* v. *United States*, 275 U. S. 310; and *Lustig* v. *United States*, 338 U. S. 74; cf. *McNabb* v. *United States*, 318 U. S. 332. The Court has recently explained this federal rule as having been adopted because convictions based on the use of unlawfully acquired evidence tend to "encourage the kind of society that is obnoxious to free men." *Walder* v. *United States*, 347 U. S. 62, 65. However, this rule is not one which the Constitution requires individual states to adopt. *Wolf* v. *Colorado*, 338 U. S. 25. A majority of the states have rejected it as a rule of state practice. See *Wolf* v. *Colorado*, *supra*, at 33–39. The frequent rejection of this rule in individual states has been based primarily on its effect in excluding trustworthy, reliable, relevant and probative evidence from criminal prosecutions. The extension here sought of the federal exclusionary rule would require lower federal courts to interfere with and control state courts in determining ahead of trial what evidence the state court is free to hear in the course of state criminal prosecutions.

Furthermore, in this case suppression occurred for reasons which do not establish any

clear-cut violation of the right of privacy, thus further pointing up the undesirability of having a federal court dictate to a state court the evidence which it should be allowed to use. A federal search warrant was in fact applied for and issued to the federal narcotics agent. He discovered the unlawful marihuana while operating under this warrant (Tr. 3). As far as appears from the record on appeal, the challenge to its validity may have been based only on the inclusion of hearsay statements in the affidavit to establish probable cause (Tr. 3–4). While the district judge sustained petitioner's challenge, his order was wholly unappealable by the Government. A state judge might properly reach a contrary result.

2. If petitioner should be convicted in the state prosecution, the same federal question which he here asserts could be tested through an appeal to state appellate courts, and, if necessary, by a certiorari petition to this Court. This would be a far more appropriate and orderly method of review, should petitioner be hereafter convicted in a state prosecution based upon the use of this federally suppressed evidence. Thus a needless clash between coordinate courts, state and federal, would be avoided, without in any way denying the petitioner a full opportunity to get appropriate rulings on the federal question which he here raises prematurely.

CONCLUSION

We must, of course, acknowledge that the case presents a substantial issue, in a field in which this Court has recently shown much interest and where various conflicting views have been expressed. If the Court believes that it would be useful to determine whether a federal court should affirmatively restrain a federal officer from testifying or supplying evidence in a state criminal proceeding, where the federal officer is the sole complaining witness and his testimony and evidence were acquired during a federal search that has been declared improper, this case might offer an appropriate opportunity.

However, further review would seem unnecessary, since the decision below appears to be correct in the light of this Court's prior decisions (a) holding the federal exclusionary rule inapplicable to state courts and (b) enjoining lower federal courts from interfering with the conduct of state judicial proceedings. Therefore, it is respectfully submitted that the petition for a writ of certiorari should be denied.

SIMON E. SOBELOFF,
Solicitor General,
WARREN OLNEY III,
Assistant Attorney General,
GRAY THORON,
Special Assistant to the Attorney General,
BEATRICE ROSENBERG,
FELICIA DUBROVSKY,
Attorneys.

FEBRUARY 1955.

U. S. GOVERNMENT PRINTING OFFICE 1955

Office - Supreme Court, U. S.
FILED
SEP 22 1955
HAROLD B. WILLEY, Clerk

No. 30

In the Supreme Court of the United States

OCTOBER TERM, 1955

DANTAN GEORGE REA, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES

SIMON E. SOBELOFF,
Solicitor General,
WARREN OLNEY III,
Assistant Attorney General,
MARVIN E. FRANKEL,
Assistant to the Solicitor General,
BEATRICE ROSENBERG,
Attorney,
Department of Justice,
Washington 25, D. C.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Constitutional provision and rules involved	2
Statement	3
Summary of argument	5
Argument:	
Introduction	10
I. Under the decisions of this Court, the suppression of evidence illegally seized by federal officers has applied as a rule of evidence only for federal proceedings	14
A. The rule of suppression, judicial in origin, is not dictated by the Fourth or Fourteenth Amendment	14
B. Rule 41 (e) of the Federal Rules of Criminal Procedure does not require that evidence wrongfully seized by a federal officer be suppressed by the federal court to prevent its use in a state court	18
C. The federal rule of suppression has been limited to federal proceedings and, even there, has not been expansively applied	21
II. The application for relief is premature and seeks an unjustified intrusion by a federal district court upon state criminal proceedings	28
A. If the Constitution barred use of the evidence by the state court, there would be no reason for the federal court to intervene in this case	29
B. If the state court is free to receive the evidence, the federal court should not suppress it	30

Argument—Continued Page

II. The application for relief, etc.—Continued

C. The state's action may alter or eliminate problems presented by premature federal intervention 33

Conclusion 36

CITATIONS

Cases:

Adams v. *Maryland*, 347 U. S. 179 ..... 18, 20

Agnello v. *United States*, 269 U. S. 20 ..... 7, 23

Allen v. *State*, 178 Md. 269 34

Beal v. *Missouri Pacific Railroad*, 312 U. S. 45 30

Bell v. *Hood*, 327 U. S. 678 ..... 7, 20, 21

Boyd v. *United States*, 116 U. S. 616 27

Byars v. *United States*, 273 U. S. 28 24

Breithaupt v. *Abram*, 58 N. M. 385 35

Centracchio v. *Garrity*, 198 F. 2d 382, certiorari denied, 344 U. S. 866 20

Commonwealth v. *Loesel*, 155 Pa. Sup. 461 34

Connolly v. *Medalie*, 58 F. 2d 629 23

Douglas v. *City of Jeannette*, 319 U. S. 157 ..... 9, 21, 30, 31

Entick v. *Carrington*, 19 Howard St. Tr. 1029 17

Foley v. *United States*, 64 F. 2d 1, certiorari denied, 289 U. S. 762 20

Fried, In re, 161 F. 2d 453 20

Gallimore v. *State*, 173 Tenn. 178 34

Gibson v. *United States*, 149 F. 2d 381, certiorari denied *sub nom. O'Kelly* v. *United States*, 326 U. S. 724 23

Go-Bart Co. v. *United States*, 282 U. S. 344 20

Goldstein v. *United States*, 316 U. S. 114 23

Gouled v. *United States*, 255 U. S. 298 27

Irvine v. *California*, 347 U. S. 128 ..... 6, 7, 15, 16, 24, 25, 27

Lustig v. *United States*, 338 U. S. 74 25

Olmstead v. *United States*, 277 U. S. 438 24

Pennsylvania v. *Williams*, 294 U. S. 176 30

People v. *Cahan*, 44 A. C. 461 34

Raffiele v. *Granger*, 196 F. 2d 620 20

Railroad Commission v. *Pullman Co.*, 312 U. S. 496 30

Cases.—Continued

	Page
Salsburg v. *Maryland*, 346 U. S. 545	15, 17
Schwartz v. *Texas*, 344 U. S. 199	6, 15, 19
Silverthorne v. *United States*, 251 U. S. 385	22
State v. *Dillon*, 34 N. M. 366	35
Stefanelli v. *Minard*, 342 U. S. 117	7, 9, 15, 21, 30, 31, 32
Tonje v. *People of Puerto Rico*, 187 F. 2d 1020	34
United States v. *Jeffers*, 342 U. S. 48	23
United States v. *Mitchell*, 322 U. S. 65	26
Walder v. *United States*, 347 U. S. 62	7, 23
Watson v. *Buck*, 313 U. S. 387	9, 30
Weeks v. *United States*, 232 U. S. 383	5, 17, 23, 24, 35
Wolf v. *Colorado*, 338 U. S. 25	5, 6, 7, 8, 12, 15, 17, 24, 25, 26, 27

Constitution and Statutes:

Constitution of the United States:	
Fourth Amendment	2, 12, 15
Fourteenth Amendment	13
Act of August 9, 1939, c. 618, 53 Stat. 1291, 49 U. S. C. 781	10
18 U. S. C.:	
3771	18
3772	18
Federal Rules of Criminal Procedure:	
Rule 1	2, 18
41 (e)	2, 6, 10, 18, 19, 20
54	19

In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 30

DANTAN GEORGE REA, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the Court of Appeals (R. 14–19) is reported at 218 F. 2d 237. The opinion of the District Court (R. 8) is unreported.

JURISDICTION

The judgment of the Court of Appeals was entered on December 23, 1954 (R. 19). The petition for a writ of certiorari was filed on January 19, 1955, and was granted on March 7, 1955 (R. 20). The jurisdiction of this Court rests on 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether a federal court should enjoin federal officers from turning over to a state, and from testifying in a state criminal proceeding regarding, evidence which had been seized under an invalid federal search warrant and had been suppressed in the federal court.

CONSTITUTIONAL PROVISION AND RULES INVOLVED

The Fourth Amendment to the Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Federal Rules of Criminal Procedure provide in pertinent part:

> RULE 1.-SCOPE.
>
> These rules govern the procedure in the courts of the United States and before United States commissioners in all criminal proceedings, with the exceptions stated in Rule 54.
>
> RULE 41. SEARCH AND SEIZURE.
>
> * * * * *
>
> (e) *Motion for Return of Property and to Suppress Evidence.*
>
> A person aggrieved by an unlawful search and seizure may move the district

court for the district in which the property was seized for the return of the property and to suppress for the use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant, or (2) the warrant is insufficient on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or (5) the warrant was illegally executed. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. The motion to suppress evidence may also be made in the district where the trial is to be had. The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing.

STATEMENT

On September 12, 1953, an indictment charging the unlawful acquisition of marihuana in violation of 26 U. S. C. 2593 (a) was returned against petitioner in the United States District Court for New Mexico (R. 2). Petitioner subsequently moved to suppress as evidence marihuana and

other property taken from his home by federal narcotics agent Salter, on the ground that the warrant on which the search was based was invalid[1] (R. 3–4). The motion sought to have the property "suppressed as evidence against him in any criminal proceeding", including the proceeding in which the motion was filed (R. 3–4). On June 18, 1954, the District Court granted the motion to suppress, and, on the Government's motion, dismissed the indictment (R. 4).[2]

Thereafter, on the basis of a complaint filed by federal narcotics agent Salter, a warrant of arrest was issued against petitioner by a New Mexico court charging him with possession of marihuana in violation of state law. Petitioner was arrested and held for trial in the state court on this charge. (R. 7.)

Alleging that the evidence which had been suppressed in the federal court formed the basis of the state charge, petitioner, on June 21, 1954, sought in the United States District Court an order holding Salter in contempt for violation of the order of suppression and enjoining him and other agents of the United States from transferring the seized evidence to state authorities or testifying with respect thereto in the state courts

[1] Petitioner's motion alleged that (a) the warrant was insufficient on its face, (b) no probable cause existed, and (c) the affidavit was based on unsworn statements (R. 3–4).

[2] The motion did not seek the return of the marihuana. Since it was contraband, it was not returned.

(R. 5–7). The District Court denied the motion, holding that (R. 8):

> * * * suppression of evidence in a Federal Court, under Rule 41 of the Federal Rules of Criminal Procedure, and the Fourth Amendment to the Constitution of the United States, applies only to proceedings in a United States District Court, and does not govern the use of that evidence in a State Court.

On appeal, the Court of Appeals affirmed the order (R. 19).

SUMMARY OF ARGUMENT

In seeking to enjoin a federal narcotics agent from turning narcotics over to a state and testifying in a state court, petitioner asks the federal court to preclude the use of evidence in a state prosecution for a state offense. Such a result would (1) extend the federal rule of suppression, which has heretofore operated as a rule of evidence only for federal trials, and (2) effectively qualify the holding in *Wolf* v. *Colorado*, 338 U. S. 25, 33, "that in a prosecution in a State court for a State crime the Fourteenth Amendment does not forbid the admission of evidence obtained by an unreasonable search and seizure." The considerations for and against the suppression in state trials of evidence illegally procured by federal officers are closely balanced. A decision for suppression will have direct impact upon

state rather than federal prosecutions. If such a decision is to be made, it should follow, not precede, the state's opportunity to consider and defend its judgment on this matter of state concern. There is no sufficient showing of need or justification for tying the state's hands in advance in this proceeding to which the state is not even a party.

I

Under the decisions of this Court, the suppression of evidence illegally seized has applied, as a rule of evidence, only for federal proceedings. It would be an extension to apply it, even indirectly, to state court trials.

A. The rule of suppression is a federal judicial principle for implementing the Fourth Amendment. It is not inescapably required by that Amendment; even more clearly, it is not imposed upon the states by the Fourteenth. *Wolf* v. *Colorado, supra; Irvine* v. *California*, 347 U. S. 128.

B. Rule 41 (e) of the Federal Rules of Criminal Procedure neither requires nor authorizes the suppression petitioner seeks. Like all the Rules of which it is part, 41 (e) applies only to the federal courts and federal proceedings. Rule 1. Cf. *Schwartz* v. *Texas*, 344 U. S. 199, 203.

While we dispute the asserted basis in Rule 41 (e), we agree with petitioner that there is jurisdiction to grant the relief he seeks. The claim is violation of a federal constitutional right

by a federal officer acting under a federal warrant. These circumstances seem sufficient to invoke the federal court's equitable jurisdiction. Cf. *Bell* v. *Hood*, 327 U. S. 678, 684. Accordingly, conceding federal judicial power to order suppression, our arguments against this result are considerations of policy. *Stefanelli* v. *Minard*, 342 U. S. 117, 120.

C. The decided cases have so far defined the federal doctrine of suppression as a rule of evidence governing only federal proceedings. Even in such proceedings, the rule has stopped well short of the limits abstract logic might support. The rule may be invoked only by one whose constitutional rights have been invaded, not by anyone harmed by the admission of evidence illegally obtained. *Agnello* v. *United States*, 269 U. S. 20, 35. It may not be employed to exclude evidence which demonstrates a defendant's perjury in the trial. *Walder* v. *United States*, 347 U. S. 62, 65. And it does not render inadmissible in a federal court evidence unlawfully seized by a state officer. *Weeks* v. *United States*, 232 U. S. 383, 398; *Irvine* v. *California*, 347 U. S. 128, 136.

In addition to these limitations in the federal courts themselves, it is, of course, important here that the states have not been required to adopt the rule of suppression. *Wolf* v. *Colorado*, *supra*. The confinement of the doctrine as a strictly federal rule of evidence reflects a recognition that

most Anglo-American courts, sharing the prohibition against unreasonable searches and seizures, have rejected suppression of illegally seized evidence as an appropriate means of enforcement. *Id.* at 28–29. The fact that this is a matter within "an allowable range of judgment on issues not susceptible of quantitative solution" (*id.* at 28) in itself argues against the extension for which petitioner contends. On the other hand, the new problem here relates to evidence illegally seized by a federal officer under a federal warrant—factors which favor suppression of the evidence even in a state trial.

II

The substantive issue, which is a close one, is of primary concern to the states. Whatever the ultimate answer is to be, the critical problem is whether the federal court should reach out now and control the state's proceedings before the state has made its determination. In our view, this action is premature; the issue should be remitted to the state proceeding.

A. If petitioner is correct in arguing that the state court must exclude the evidence in question, there is no need or justification for federal intervention at this point. Due regard for the states and for the principle that equity will not ordinarily enjoin a criminal prosecution would combine to stay the hand of the federal court.

Douglas v. *City of Jeannette*, 319 U. S. 157, 163; *Watson* v. *Buck*, 313 U. S. 387, 400.

B. If the state is free to receive the evidence, the federal court should not prevent it from doing so. Though it concerned state rather than federal officers, *Stefanelli* v. *Minard*, 342 U. S. 117, 122, controls here with its holding "that the federal courts should refuse to intervene in State criminal proceedings to suppress the use of evidence even when claimed to have been secured by unlawful search and seizure."

On the assumption that the state may use the evidence, suppression in this case would make for capricious results. Exclusion would then depend on whether the evidence had been turned over to the state before federal intervention was sought. Rules implementing the rights of privacy should not predicate their consequences upon unseemly races to and between state and federal courthouses. If the states are to be denied such evidence, its use should invalidate state convictions. And for this ultimate result, if it is to be reached, federal intervention in advance is unnecessary and unjustified.

C. The propriety of federal action now cannot be determined simply by projecting possible conclusions as to the state's power to use the evidence involved. For the fact is that this ultimate question may itself be affected by the state's action which petitioner seeks to foreclose. The nature of the search in this case—where there

was a warrant, though it was held insufficient under federal law—is a matter the state should be free in the first instance to explore for itself. Considerations of state policy, still undeveloped in this case on its undeveloped facts, are important. The state may exclude the evidence, adopting the *Weeks* rule or some variant of it as applicable to federal searches. And if the state chooses to employ the evidence, its reasons for doing so are entitled to be heard and weighed.

ARGUMENT

Introduction

The difficult question this case presents is of primary concern to the State of New Mexico rather than the Federal Government. The purpose of the instant proceeding is to have the federal court suppress evidence to prevent its use in a state prosecution for a state offense. Before the present motion was made, petitioner had already obtained an order suppressing the use of the evidence in federal proceedings, and that ruling, from which the Government could not appeal, must be accepted as binding on the federal courts. There is no claim, and there could be none, that petitioner was entitled to the return of the contraband narcotics.[3] Moreover, even if the

[3] Since the marihuana was contraband, Act of August 9, 1939, c. 618, 53 Stat. 1291, 49 U. S. C. 781, petitioner was not entitled to the return thereof under Rule 41 (e), F. R. Crim. P.

property were the kind that could have been returned to petitioner, he would not thereby have obtained the relief which he seeks. It may be that, if the property had been returned, considerations of self-incrimination (not the Fourth Amendment) would have prevented the state from subpoenaing the evidence. But petitioner attempts to bar, not only the physical transfer of the property, but oral testimony of the federal officer as to the circumstances under which the narcotics were found.

Thus, petitioner seeks the suppression of evidence before a state court and not the mere equivalent of the return of property. The essential question now before this Court, therefore, is whether the State of New Mexico should be barred by the federal courts from determining for itself whether the evidence should be admitted in a state prosecution for a state offense because it was a federal officer who conducted the search, and whether that decision should be made by the federal courts before the state has had an opportunity to pass upon the question. Phrased otherwise, the issue is whether the federal rule of suppression extends so far as to bar federal officers from testifying in a state prosecution for a state offense even though in so doing they would act merely as witnesses in the state proceeding.

The solution to this problem depends, in large part, on the concepts which are deemed to control in defining the federal rule of suppression.

The answers may vary depending on whether the rule is regarded primarily as (1) necessarily inherent in the Fourth Amendment, (2) a vindication by the federal courts of the Fourth Amendment rights of any individual before them as against illegal executive action, or (3) a rule of evidence in federal proceedings. As we read the decisions of this Court, the rule of suppression is a federal rule of evidence, created under the power of the federal courts to determine what evidence should be received, and extending only to federal proceedings. It is not a rule inescapably imbedded in the Fourth Amendment. It is a vindication of the personal rights of the individual or a penalty for illegal executive action only to the extent that the courts, in shaping their rules of evidence, choose not to accept evidence they regard as tainted by illegal executive action. It is not and cannot be a general disciplinary measure against executive officers. As a federal rule of evidence, it extends only to federal proceedings and has not been used to dictate to the states what evidence they may or may not use in a state criminal prosecution for a state crime.

It follows that the ultimate result petitioner seeks—suppression of such evidence in the state court trial—would entail a significant extension of the rule and a qualification of the holding in *Wolf* v. *Colorado*, 338 U. S. 25, 33, "that in a prosecution in a State court for a State crime the

Fourteenth Amendment does not forbid the admission of evidence obtained by an unreasonable search and seizure." The arguments for and against such an ultimate result are closely balanced. If the step is to be taken—if the states are to be denied the use of evidence like that in this case—we think such a rule should apply squarely and forthrightly to the states, upon which it will operate. This is to say that acceptance of petitioner's view on the merits of the problem of state use of the evidence should be effective to invalidate (on direct review) a state conviction based upon the disputed evidence. There would be, therefore, no need or justification for the federal district court to reach out now and preclude the state in advance from receiving this evidence. It is, we suggest, an unsatisfactory alternative to hold that petitioner's motion to suppress should be granted but that, had the state obtained the evidence and used it for conviction before the motion was made in the federal court, the conviction would not be reversed as violative of the Fourteenth Amendment. Such a conclusion would leave the rights of privacy to vary fortuitously with procedural and chronological distinctions which should make no constitutional difference.

On the foregoing premises, we urge that petitioner's complaint is premature. In the discussion which follows we show that action by a fed-

eral court to prevent a state's use of the evidence in question would go beyond the precedents defining the federal rule of suppression, which has been confined to controlling federal prosecutions in federal courts, and, even within these limits, has been restricted to less than the scope abstract logic might support. There is doubt whether this rule, which this Court has acknowledged to reflect a minority view in Anglo-American courts, should be broadened directly or indirectly to reach the type of state prosecution pending here. But we submit, in any event, that the extension should not be accomplished indirectly, in a case where the state affected is not a party and has not had an opportunity either to consider the problem for itself or to defend the judgment its policy may dictate.

I. Under the decisions of this Court, the suppression of evidence illegally seized by federal officers has applied as a rule of evidence only for federal proceedings

A. The rule of suppression, judicial in origin, is not dictated by the Fourth or Fourteenth Amendment

In his first point (Br. 9–24), petitioner seeks to resolve what he treats as the "issue squarely tendered" (Br. 9) with the contention that the Fourth Amendment necessarily bars the admission in a state court of the evidence involved. The argument collides with two propositions announced in the recent decisions of this Court. First, although a right of privacy like that of the Fourth Amendment is conferred against the

states by the Fourteenth, the states are not required to exclude illegally seized evidence in their judicial proceedings. *Wolf* v. *Colorado*, 338 U. S. 25; *Salsburg* v. *Maryland*, 346 U. S. 545; *Irvine* v. *California*, 347 U. S. 128; see also *Stefanelli* v. *Minard*, 342 U. S. 117; *Schwartz* v. *Texas*, 344 U. S. 199. Second, as the Court indicated in the *Wolf* case, the federal rule of suppression is judicial in its origin, may well be subject to amendment by Congress, and is not a necessary corollary of the Fourth Amendment.

Thus, the majority opinion in *Wolf* states with respect to the federal rule (338 U. S. at 28):

> This ruling was made for the first time in 1914. It was not derived from the explicit requirements of the Fourth Amendment; it was not based on legislation expressing Congressional policy in the enforcement of the Constitution. The decision was a matter of judicial implication.[1]

And Mr. Justice Black, in his concurring opinion, said (*id.* at 39–40):

> "* * * I agree with the conclusion of the Court that the Fourth Amendment's prohi-

[1] The Court also said (338 U. S. at 33):

"* * * And though we have interpreted the Fourth Amendment to forbid the admission of such evidence, a different question would be presented if Congress under its legislative powers were to pass a statute purporting to negate the *Weeks* doctrine. We would then be faced with the problem of the respect to be accorded the legislative judgment on an issue as to which, in default of that judgment, we have been forced to depend upon our own. * * *"

bition of "unreasonable searches and seizures" is enforceable against the states. Consequently, I should be for reversal of this case if I thought the Fourth Amendment not only prohibited "unreasonable searches and seizures" but also, of itself, barred the use of evidence so unlawfully obtained. But I agree with what appears to be a plain implication of the Court's opinion that the federal exclusionary rule is not a command of the Fourth Amendment but is a judicially created rule of evidence which Congress might negate.

The implications of the *Wolf* case were followed in *Irvine* v. *California*, 347 U. S. 128, where the inapplicability of the rule of suppression in state court proceedings was reaffirmed despite a gross violation of the right of privacy. Mr. Justice Jackson's opinion reiterated that the security of privacy is embodied in the Fourteenth Amendment, but, as in *Wolf*, declined to make "subsidiary procedural and evidentiary doctrines developed by the federal courts" applicable to the states. 347 U. S. at 132.

The rationale of these decisions is that, while unreasonable searches and seizures are proscribed by the Fourteenth as well as the Fourth Amendment, the penalty for an illegal search is not there prescribed inescapably. Accordingly, so long as a state does not affirmatively sanction illegal searches and seizures, it is free to decide for itself the means by which it will enforce the right of

privacy. *Salsburg* v. *Maryland*, 346 U. S. 545, 554.

Since this much is clear, the state cases cited by petitioner (Br. 23–24), dealing with the admissibility of evidence illegally seized by federal officers, furnish little guidance here. The decisions excluding such evidence stem from states which have adopted for themselves the rule of suppression announced for the federal courts in *Weeks* v. *United States*, 232 U. S. 383. The contrary decisions admitting such evidence come from states which have rejected the rule. (See the summary of state law with relation to the *Weeks* rule in the Appendix to the opinion of the Court in *Wolf* v. *Colorado*, 338 U. S. 25, 33–38.) Both groups of cases, like the decisions of this Court, leave clear our first proposition—that neither the Fourth nor the Fourteenth Amendment, in and of itself, *requires* the rule of suppression for which petitioner contends.

B. Rule 41 (e) of the Federal Rules of Criminal Procedure does not require that evidence wrongfully seized by a federal officer be suppressed by the federal court to prevent its use in a state court

There can be little doubt that Congress—implementing the Fourth and the Fourteenth Amendments and exercising its power of control over federal officers—could provide, if it saw fit, that evidence illegally seized by *federal* officers should be suppressed for all purposes, in state as well as federal courts. Compare *Adams* v. *Maryland*, 347 U. S. 179, which held that former 18 U. S. C. 3486, prohibiting the use of testimony given by a witness in a congressional inquiry "as evidence in any criminal proceeding against him in any court," applied to state as well as federal courts.

There is, however, no statute giving such effect to an illegal search by federal officers. The only expression of the federal rule of suppression which may be said to be sanctioned by statute is Rule 41 (e) of the Federal Rules of Criminal Procedure. These rules, promulgated pursuant to the authority contained in 18 U. S. C. 3771 and 3772, which do not authorize the making of rules for state courts, are entitled "Rules of Criminal Procedure for the District Courts of the United States." Rule 1, which defines the scope of the rules, provides that they shall "govern the procedure in the courts of the United States and before United

States commissioners in all criminal proceedings," with the exceptions stated in Rule 54. Plainly, these are rules for the federal courts and do not extend beyond the federal courts. The sentence in Rule 41 (e) that "If the motion is granted the property * * * shall not be admissible in evidence at any hearing or trial" cannot be read in isolation from the unambiguous provisions confining all the rules to federal proceedings. As this Court said in *Schwartz* v. *Texas*, 344 U. S. 199, 202–203, in holding that evidence secured in violation of Section 605 of the Federal Communications Act (48 Stat. 1103, 47 U. S. C. 605) could be admitted in a state court:

> It will not be presumed that a federal statute was intended to supersede the exercise of the power of the state unless there is a clear manifestation of intention to do so. The exercise of federal supremacy is not lightly to be presumed.

Surely, the presumption is not to be indulged where Congress has expressly negated it.[5]

We submit, then, that Rule 41 (e) neither requires nor authorizes suppression of federally seized evidence to prevent its use in state proceedings.[6] Petitioner's contrary view (Br. 34–36)

---

[5] It should be noted, in passing, that the *Schwartz* case was before this Court on review of a state criminal conviction.

[6] Under Rule 41 (e), the court has no right to compel return of the physical contraband property to petitioner. See *supra*, p. 10, fn. 3. It can, by virtue of that Rule and by virtue of the judicial power to make rules of evidence,

rests upon a failure to acknowledge the clear limitations of the federal rules and a consequent misreading of the decision in *Adams* v. *Maryland*, 347 U. S. 179.

It does not follow, however, that the inadequacy of Rule 41 (e) as a basis precludes the relief petitioner seeks. There is before the federal court an individual alleging violation of a federal constitutional right by a federal officer, claiming that the remedy afforded him by the state court will not be adequate to protect his federal rights. Such allegations appear sufficient to invoke the equitable jurisdiction of the court. Cf. *Bell* v.

---

control the disposition of the property without regard to its physical transfer, insofar as the use of such property affects federal judicial proceedings. But nothing in Rule 41 (e) gives it power to control the disposition of the property in other respects. The summary power of the federal courts over improperly seized evidence has been based on the principle that the court may reach forward to control presentation of evidence in a case which may come before it. *In re Fried*, 161 F. 2d 453, 458 (C. A. 2); see also *Foley* v. *United States*, 64 F. 2d 1, 3 (C. A. 5), certiorari denied, 289 U. S. 762. It is on this basis that cases in which the summary power has been exercised can be explained. *Go-Bart Co.* v. *United States*, 282 U. S. 344; *Centracchio* v. *Garrity*, 198 F. 2d 382 (C. A. 1), certiorari denied, 344 U. S. 866; *Raffaele* v. *Granger*, 196 F. 2d 620 (C. A. 3). That rationale would seem to preclude extension of the summary power beyond the point necessary to control of federal judicial action. Particularly is this so in the instant case where, at the time petitioner sought the relief presently at issue, he had already had the evidence suppressed as to federal courts and the indictment based on that evidence had already been dismissed.

Hood, 327 U. S. 678, 684, where the Court held that allegations in an action for damages that federal officers had invaded Fourth Amendment rights was sufficient to confer jurisdiction on the district court. The Court said:

> where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief.

See, also, *Douglas* v. *City of Jeannette,* 319 U. S. 157, 161–162.

In short, the effort in this portion of our argument has been merely to correct what we believe to be a misreading of Rule 41 (e). We assume, nevertheless, that there is jurisdiction to make the order of suppression for which petitioner has contended. On this assumption, our ultimate arguments against the granting of such relief are considerations of policy, not of power. Cf. *Stefanelli* v. *Minard,* 342 U. S. 117, 120.

C. The federal rule of suppression has been limited to federal proceedings and, even there, has not been expansively applied

To a large extent, petitioner's argument (see Br. 9–24) strives for the conclusion that evidence illegally seized by federal officers would render invalid a state conviction following a trial in which such evidence had been received. We urge below (pp. 29–30) that this conclusion would militate strongly against, not for, the action of a fed-

eral court to prevent the state court from considering the evidence and determining for itself in the first instance whether it should be used. Here, agreeing with the petitioner (Br. 10) that "the precise point at issue" is a new one, we consider the precedents which bear upon the use in state courts of evidence illegally seized by federal officers. Our conclusions are that that issue is a close one; that the federal rule of suppression has been kept within bounds marked, not by pure logic, but by the fact that this is an area of conflicting and delicately balanced judgments of policy; and that the counsel of restraint which has characterized the cases casts doubt upon the propriety of the extension for which petitioner contends.

Urging that a federal court should undo the effects of an unlawful federal search to the fullest extent possible, even beyond the federal courts, petitioner relies upon the general language in *Silverthorne* v. *United States*, 251 U. S. 385, 392: "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all." But the familiar admonition to read broad language in the context of the facts to which it applies is highly appropriate here. In *Silverthorne*, the Federal Government, for purposes of federal proceedings before a federal grand jury, was endeavoring to subpoena documents of which

it had previously obtained knowledge through an illegal federal search. What the Court actually held was that this attempt to circumvent the *Weeks* rule was improper, and it was for this conclusion that the opinion observed that evidence unlawfully acquired "shall not be used at all," *i. e.* by federal officials at any stage in the performance of their federal functions related to the courts.

It remains clear that the rule of suppression has never been as broad as the literal terms of this generalization. Thus, the rule may be invoked only by one whose constitutional rights of privacy have been violated, and evidence unlawfully seized may be used against one who lacks this standing. *Agnello* v. *United States,* 269 U. S. 20, 35; *Connolly* v. *Medalie,* 58 F. 2d 629, 630 (C. A. 2); *Gibson* v. *United States,* 149 F. 2d 381, 384 (C. A. D. C.), certiorari denied *sub. nom. O'Kelly* v. *United States,* 326 U. S. 724; see *Goldstein* v. *United States,* 316 U. S. 114, 121; cf. *United States* v. *Jeffers,* 342 U. S. 48, 54. Similarly, only last year the Court rejected as a "perversion of the Fourth Amendment" an extension which would have permitted a defendant to give perjurious testimony and to prevent the demonstration of its falsity on the ground that the evidence supplying the demonstration had been unlawfully obtained (*Walder* v. *United States,* 347 U. S. 62, 65)—although, here again, the literal statement that such evidence "shall not be used

at all" would require a contrary result. And, of course, the cases, like *Wolf* v. *Colorado*, allowing the states to convict on evidence unlawfully seized represent a substantial limitation, particularly weighty in this case, upon the generalization petitioner invokes.

What the cases show, in short, is that the federal courts, for the purposes of federal proceedings, have enforced the rule of suppression in a refusal to give judicial sanction to the use of equivocal methods by the government of which they are a part. *Byars* v. *United States*, 273 U. S. 28, 33; and see the dissenting opinion of Mr. Justice Holmes in *Olmstead* v. *United States*, 277 U. S. 438, 469–471. The rule has never been and cannot be a complete vindication of the rights of privacy. As was pointed out in *Irvine* v. *California*, 347 U. S. at 136, the rule "does nothing to protect innocent persons who are the victims of illegal but fruitless searches." And even within the confines of federal proceedings, the rights of privacy have not been enforced by suppression in every case of proffered evidence obtained by an unreasonable search. Thus, in addition to the limitations already noted, it was held in *Weeks* v. *United States*, 232 U. S. 383, 398, the case in which the rule originated, and assumed in *Byars* v. *United States*, 273 U. S. 28, 33, that evidence illegally seized by state officers could be used in the federal courts. Since both of these decisions were predicated on the assump-

tion that the prohibition against unreasonable searches and seizures was inapplicable to the states, their rationale is no longer wholly acceptable. But the actual result, that the rule of suppression applies only to illegal acts of federal officers, was apparently deemed sound as recently as *Irvine* v. *California*, 347 U. S. 128, 136, though it was then clear that comparable conduct of state officers was equally banned by the Constitution. And see *Lustig* v. *United States*, 338 U. S. 74.

Against this background, we confront here a situation where the forces which have shaped both the federal rule and the refusal to extend it to the states are tensely balanced. On the one hand, the ultimate relief petitioner seeks is the exclusion of illegal evidence from a state court and is in this sense a modification of *Wolf* v. *Colorado*. On the other hand, the unlawful seizure was made by a federal officer, and to the extent that the federal rule is regarded as a device for disciplining federal law enforcement officers, its logic might be extended to these circumstances.

But because the result would clearly be an extension, necessarily treading upon the states, there are imposing considerations against it. In the first place, the Court has characteristically kept within narrowly defined self-imposed limitations in its use of rules of evidence as disciplinary devices against federal law enforcement

officers. In another context, in *United States* v. *Mitchell*, 322 U. S. 65, 70-71, holding that illegal conduct by police officers did not vitiate a valid confession previously given, the Court said:

> * * * [The Court's] duty in shaping rules of evidence relates to the propriety of admitting evidence. This power is not to be used as an indirect mode of disciplining misconduct.

While the suppression in state courts of evidence illegally procured by federal officers would undoubtedly have some disciplinary and deterrent effects on federal personnel (as does the rule considered in *United States* v. *Mitchell, supra*), similar judgments on the proper role of the federal judiciary counsel against the decidedly "indirect mode of disciplining misconduct" championed by petitioner.

A further, but not unrelated, argument against expanding the rule of suppression, particularly where the expansion will effect a restriction upon the states, is the fact that this remedy is not "an essential ingredient of the right." *Wolf* v. *Colorado*, 338 U. S. 25, 29. Recognizing in *Wolf* "that in fact most of the English-speaking world does not regard as vital" to protection of the right of privacy the exclusion of evidence obtained in violation of the right (*ibid.*), the Court there left the states free to adopt or reject this remedy for themselves as a matter within "an allowable range of judgment on issues not sus-

ceptible of quantitative solution." *Id.* at 28. The ultimate relief petitioner seeks would necessarily restrict that "range of judgment," and thus would fail to jibe with this rationale of the *Wolf* decision. Going beyond the rule of suppression as an exercise of power "to exclude illegally obtained evidence in *federal* trials" (*Irvine* v. *California*, 347 U. S. 128, 134—emphasis added), it would command for state trials a still debated restriction evolved as "a matter of judicial implication." *Wolf* v. *Colorado*, *supra*, at 28.[7]

[7] The solution of the problem presented is not aided by petitioner's attempt (Br. 28–31) to inject the Fifth Amendment into the discussion. While the Court has recognized an interrelationship between the Fifth and the Fourth Amendments, the decisions which do so deal with the situation where the search, actual or constructive, results in the taking of *evidence*, innocuous in itself but serving to help prove a crime (*e. g.*, a diary or other papers), as distinguished from contraband or fruits or instrumentalities of the crime. This appears clearly from the leading case in this field, *Boyd* v. *United States*, 116 U. S. 616, and also from *Gouled* v. *United States*, 255 U. S. 298, on which petitioner relies. The Fifth Amendment comes into play in such cases because the evidence is such that it may not be used even though seized under a valid warrant. What was involved in the search in the instant case, however, was contraband, not evidentiary materials. And certainly if the narcotics agent were allowed to testify as to what he saw when he was executing the invalid warrant, there would be no violation of the privilege against self-incrimination, whatever else might be involved. Thus, the question here is purely and simply the extent of redress to be afforded for a search invalid under federal law. The privilege against self-incrimination plays no part in the answer.

Weighing the considerations outlined above, we suggest that the balance may point against petitioner's broad contention that a state cannot now constitutionally receive evidence illegally obtained by a federal officer. But the very formulation of the problem reflects the obvious point that its impact is primarily upon the states rather than the Federal Government as such. For federal prosecutions, the rule of exclusion is unquestioned, and the evidence here involved, found to have been obtained with a warrant invalid under federal law, is unusable. What matters now is only the state prosecution to the defeat of which petitioner's effort is addressed.

In these circumstances, our major argument goes not to the merits of the troublesome state exclusion problem, but to the impropriety of the effort to resolve the problem in a federal court in the present posture of this case. Before it is decided whether a state may use the evidence in question, we think the state should have an opportunity to consider the problem for itself and to be heard if its decision is for admissibility. We turn to a fuller statement of this view.

II. The application for relief is premature and seeks an unjustified intrusion by a federal district court upon state criminal proceedings

Whether petitioner is right or wrong in his substantive contention that the state may not constitutionally use evidence illegally obtained by a federal officer, there is no occasion for the federal

intervention he seeks in advance of the state's action. If he is right, the state should adopt his view or be corrected by this Court in the ordinary course of review. If he is wrong, the only basis for relief in this action would be a holding that the federal court must grant a motion to suppress if it is brought soon enough, but that there is no remedy where the state has obtained and used the evidence before such a motion is made. This, we submit, would be an unequal rule, creating more frictions and injustices than it would purport to solve. Finally, while we can hypothesize ultimate solutions on the merits, the fact is that the character of the problem calls for full exploration of the matters of fact and policy which remain to be examined by the state for itself. Whatever the final answers are to be, they should follow, not precede, consideration by and representation of the state, the criminal proceedings of which are directly affected.

A. If the Constitution barred use of the evidence by the state court, there would be no reason for the federal court to intervene in this case

If petitioner is correct in arguing that the state court must exclude the evidence, it cannot be assumed in advance that the state court will violate this rule. Thus, on petitioner's own hypothesis, the settled principles that courts of equity do not ordinarily enjoin criminal prosecutions and that federal courts will exercise their discretionary equity power with due regard for the inde-

pendence of state governments would render inappropriate any action by federal courts to control beforehand rulings on evidence in a state criminal proceeding. See *Stefanelli* v. *Minard*, 342 U. S. 117, 120; *Douglas* v. *City of Jeannette*, 319 U. S. 157, 163; *Watson* v. *Buck*, 313 U. S. 387, 400; *Beal* v. *Missouri Pacific Railroad*, 312 U. S. 45, 49; *Pennsylvania* v. *Williams*, 294 U. S. 176, 185; *Railroad Commission* v. *Pullman Co.*, 312 U. S. 496, 500–501. Since the remedy of exclusion in the state court would be exactly the same as the remedy petitioner seeks in the federal court, there would be no occasion for granting injunctive relief directed against the proceedings in the state court. Cf. *Douglas* v. *City of Jeannette*, 319 U. S. 157, 165.

B. If the state court is free to receive the evidence, the federal court should not suppress it

To a large extent, the considerations which led this Court in *Stefanelli* v. *Minard*, 342 U. S. 117, to refuse an injunction against use in state courts of evidence illegally seized by state officers apply to this case as well. It is true here, as it was there, that the governing considerations "touch perhaps the most sensitive source of friction between States and Nation, namely, the active intrusion of the federal courts in the administration of the criminal law for the prosecution of crimes solely within the power of the States." 342 U. S. at 120. Such interference should not be allowed except to prevent irreparable injury.

Douglas v. *City of Jeannette*, 319 U. S. 157, 163. And if the prospect that the state in *Stefanelli* might use unlawfully seized evidence (see 342 U. S. at 122) did not constitute irreparable injury, it is difficult to find here any basis for claiming such injury because the unlawful seizure was by a federal rather than a state officer. In principle as well as in its literal terms, that decision reaches this case with its holding (342 U. S. at 120) "that the federal courts should refuse to intervene in State criminal proceedings to suppress the use of evidence even when claimed to have been secured by unlawful search and seizure."

Petitioner argues (Br. 32–33) that this case is wholly different from *Stefanelli* because the seizure in question was by federal rather than state officers and "the evidence in question is here in the custody of federal law * * *." Passing the question whether this concept of federal "custody" means more than that the federal court has *power* to act—a point we have conceded (*supra*, pp. 20–21) and which was assumed for the sake of decision in *Stefanelli*—the argument suggests a possibility which should be considered and, in our view, rejected. The suggestion is that suppression should follow from the federal custody alone ("federal custody" here meaning, in fact, custody by federal law enforcement officers). We have already shown (*supra*, pp. 29–30) why such action would be premature and unnecessary

if the states themselves were required to exclude the evidence. Here, on the premise that state exclusion is not required, it remains to note that suppression by the federal court would likewise be improper.

Since, as we have suggested (*supra*, pp. 24, 25–26), the *Weeks* doctrine is not primarily a general disciplinary device, the federal court should not be moved to intervene by an administrative purpose to deter or discipline erring federal officers. And it is plain that the district court should not attempt to supervise or impose its will on the state tribunal simply because a "federal factor" lurks in the case (cf. *Stefanelli* v. *Minard*, *supra*.) Moreover, petitioner's position would lead to capricious results. Under the suggested rule, nothing would prevent a state from using the type of evidence in question if it was obtained before there was a federal order of suppression. Exclusion would depend wholly on neither federal nor state law, but on which law was invoked first. Results in particular cases would be determined by the time when the fruits of unlawful federal searches were turned over to state prosecutors. The states allowing the use of such evidence would be encouraged to race against and evade a federal power of suppression based only on federal custody.

If the states are to be denied the use of such evidence, the rule should apply directly and uniformly. It should apply to preclude conviction in

every case, not merely to defeat prosecution in some cases. And if this is to be the law, there is no ground for the present action, as we have already pointed out (*supra*, pp. 29–30).

C. The state's action may alter or eliminate problems presented by premature federal intervention

Our argument thus far that this action is premature has proceeded from the viewpoint of the possible alternative conclusions on the merits which might be reached in the present posture of the case. But this approach fails to account for the point that the state decision petitioner seeks to preclude may itself have an important bearing on the nature of the federal problem.

For example, it is potentially significant, at least from the state's standpoint, that this is not a case where the violation of privacy was flagrant and unquestionable. There was a warrant, but one which the federal court found to be based upon an insufficient affidavit. Since the affidavit is not in the record and since the conclusion that it was deficient was not appealable, there is no basis here for reconsidering the exact ground for holding the search unlawful. It appears, however, that the defect lay in the fact that the affidavit on which the warrant issued was not made by a person having personal knowledge of the facts (see R. 4). This is a flaw for federal purposes which the State of New Mexico, for its purposes, could hold insufficient to nullify the war-

rant. While we have found no New Mexico decisions on the subject, not all states insist that the affidavit be on personal knowledge. See, *e. g.*, *Allen* v. *State*, 178 Md. 269; *Commonwealth* v. *Loesel*, 155 Pa. Sup. 461; *Gallimore* v. *State*, 173 Tenn. 178. And a ruling by New Mexico that, for its purposes, the affidavit was sufficient to justify the search could not be said to violate due process. Cf. *Tonje* v. *People of Puerto Rico*, 187 F. 2d 1020 (C. A. 1).

To be sure, the question of New Mexico law could not be decisive in passing judgment on a federal search. The search remains invalid for federal proceedings. Nevertheless, the circumstance that the particular search in this case appears to have been one on the propriety of which opinions could reasonably differ points up the undesirability of federal intervention at this stage. A ruling by New Mexico that the fruits of any unlawful federal search are admissible in its courts might well present a different problem from a decision holding merely that the evidence here could be received because the search through which it was obtained was not unreasonable by New Mexican standards. If, as we have argued, extension of the federal rule to this situation is at best debatable, decision should at least await concrete development of the problem as it actually arises in and is resolved by the state affected.

Moreover, it is by no means certain now that the state's action will ultimately present any basis

at all for federal action. Although New Mexico has thus far been unwilling to adopt the *Weeks* rule,[8] this is an area of flux in which, as the Court knows, the positions of the states have not remained constant. Thus, in April of this year, the California Supreme Court, overruling a long line of prior cases, held that evidence obtained by an illegal search and seizure would not be received. *People v. Cahan*, 44 A. C. 461. While New Mexico may be unwilling to adopt this broad view, it may decide, more narrowly, to adopt the *Weeks* rule for cases in which the illegal evidence was federally procured. New Mexico should have an opportunity to decide the problem for itself. And this wholly apart from the point, already considered, that if petitioner is correct in arguing that New Mexico *must* decide to exclude the evidence in this case, there is no reason for federal intervention in advance to enforce this result.

The federal courts should not undertake to decide a difficult problem of federal-state relationship and should not interfere with a state court proceeding already begun unless such a course of action is deemed absolutely necessary. No such necessity has been shown here. Whatever the rule ought to be, it should first be presented to the state court for decision.

---

[8] *State* v. *Dillon*, 34 N. M. 366; *Breithaupt* v. *Abram*, 58 N. M. 385.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below should be affirmed.

SIMON E. SOBELOFF,
Solicitor General.

WARREN OLNEY III,
Assistant Attorney General.

MARVIN E. FRANKEL,
Assistant to the Solicitor General.

BEATRICE ROSENBERG,
Attorney.

SEPTEMBER 1955.

U. S. GOVERNMENT PRINTING OFFICE 1955